Q. Now, are you aware of whether any further advice has been given to the company? A. Yes, I am.

Q. Was further advice given? A. Yes, sir.

Q. And by whom? A. By Mr. O'Neill.

Q. Do you recall, Mr. Thompson, what this further advice was? A. I don't have his letter—the letter was—with me, that is. The letter was written, as I recall it,
227 about the 14th or 15th of May to Mr. Wycoff and Mr. O'Neill, and my recollection of it is that he stated—I just don't have it with me.

I don't want to rely on my recollection of what he said in there, but I do know that there was a reply made around May 14th or 15th.

Q. Now, isn't it correct, Mr. Thompson, that Mr. O'Neill stated it as a fact that the policy of the Board was not to assign mediators in cases which were involved in litigation or in which the Board felt that no—that nothing would be accomplished?

Isn't that a fair summary of what Mr. O'Neill said in his letter?

Mr. Shapiro: Objection. The witness has indicated that he doesn't recall the contents of the letter. The letter in any event, will speak for tiself.

Since it is a letter to the Florida East Coast Company it is already available to the Company.

Mr. Devaney: The purpose of my question was not to ascertain what the letter says, Mr. Shapiro, and if this does not refresh Mr. Thompson's recollection we will proceed further.

By Mr. Devaney:

Q. I ask again, does this refresh your recollection
228 that Mr. O'Neill made these statements in his letter?

A. No, I couldn't say that that refreshes my recollection to that extent. I don't recall it specifically. I'm sorry.

Q. Now, even though you don't recall whether this was said, Mr. Thompson, is there now a policy in the Media-

tion Board that it will not assign mediators in cases which involve litigation?

Mr. Shapiro: I object to the question. It relates to the mediation practices of the Board and is regarded as privileged, and I instruct the witness not to answer.

Mr. Devaney: Now, Mr. Shapiro, this is a statement which has been made by Mr. O'Neill. At least, I am asking Mr. Thompson that if this were made, if this isn't the policy of the Board, that this has existed in the past.

I think that any privilege that is involved has certainly been waived by the assertion of this statement by the Chairman of the Mediation Board, himself.

Mr. Shapiro: Mr. Devaney, we don't have that letter with us. We don't at this time have a witness who is qualified to testify as to the contents of the letter.

I don't think there is any question of waiver of privilege at this time.

Mr. Devaney: Mr. Shapiro, I don't have a copy of
229 the letter or I would produce it.

Now, Mr. Thompson, if he wants to use the telephone and wants to call his office, can have it read to him. I don't have a copy of it or I would produce it.

And I would ask Mr. Thompson if he would do this. There's no point in pussy-footing about it. He can get on the telephone and find out very quickly what was said in the letter.

I am not trying to be cute about what is in it. I don't have a copy of the letter. This is what was reported to me.

If Mr. Thompson doesn't remember then I suggest that he call and find out and we will all be informed.

Mr. Shapiro: I think that since this deposition proceeding was scheduled at this time, and it is not a deposition duces tecum, that Mr. Thompson is not obliged to call the Board or produce any records.

Mr. Devaney: Now, you don't suggest that this is privileged information, Mr. Shapiro?

Mr. Shapiro: You mean the letter, if is has been written and—

Mr. Devaney: Yes.

Mr. Shapiro: Whatever the letter says it speaks for itself.

230 Mr. Devaney: I have explained that I do not have a copy of the letter here. It was written by Mr. O'Neill, by the Mediation Board Chairman. It was mailed to Florida and I do not have the letter here.

The only place that it would be available in Washington would be in the possession of the Mediation Board itself.

Mr. Shapiro: In any event, sir, the line of questioning seems to be whether the contents of the letter state a general Board policy or whether they relate to something that is confined to the circumstances surrounding the Florida East Coast.

It is as to that that I think we are getting into a question of the Board's general practice respecting the conduct of mediation and it is as to that that I think the privilege would lie.

Since we are in this problem of not having the letter I think that if you want to develop this line at the trial, using the letter, fine, but I don't think we can require Mr. Thompson to answer any questions concerning the Board's general policies in the conduct of mediations.

By Mr. Devaney:

Q. Mr. Thompson, is it the policy of the Board, so
231 far as you have been instructed or know, not to assign a mediator in a case in which you believe no result would be accomplished?

Mr. Shapiro: Again I object to the question on the ground that it deals with the manner in which the Board assigns cases for mediation.

I consider this matter to be privileged.

By Mr. Devaney:

Q. As I understand, Mr. Thompson, you said that there are no regulations concerning the operation of the Mediation Board's mediatory functions.

Is this correct? A. No regulation, no, not that I am aware of, no, sir.

Q. And no written rules? A. Not on mediation cases, no.

Q. Now, Mr. Thompson, has Mr. O'Neill, to your knowledge, assigned a mediator in connection with any of the other Florida East Coast cases, to your knowledge, since April 21st, 1964? A. There have been no assignments made. However, my recollection of that letter that we have been talking about is that it contains the advice to Mr. Wycoff that the mediator will be assigned to certain cases in the near future.

Q. Do you recall whether a particular mediator
232 was named? A. Yes, sir. Frank K. Switzer.

Q. Now, was there earlier correspondence between Florida East Coast and the Mediation Board, Mr. Thompson, concerning the further services of Mr. Newlin? A. The only thing I can recall is a letter from Mr. Wycoff to Mr. O'Neill objecting to some remarks which he stated Mr. Newlin had made when he was down there.

That's about all I can recall on that.

Q. Do you recall a statement by Mr. O'Neill or a letter by Mr. O'Neill that Mr. Newlin would not be assigned to further cases on Florida East Coast A. No, sir, I do not.

Q. Now, have you been instructed by Mr. O'Neill to assign Mr. Switzer to any of these cases? A. Not up to this moment, no.

Q. Has he given you any indication when Mr. Switzer will be assigned to conduct further mediatory efforts? A. No, sir.

Q. Have you made any arrangements with Mr. Switzer as to the availability for assignment to mediate these cases? A. No, I have not.

Q. Does the Mediation Board, Mr. Thompson, have on occasion some connection with the Department of
233 Labor in mediating disputes? A. None whatever to my knowledge.

Q. Now, when the Department of Labor is participating in these disputes, as it did in certain stages of the so-called national rules dispute,—you were aware of their involvement in those proceedings, were you not? A. Yes, sir.

Q. And isn't it true that the Mediation Board and various officials of the Mediation Board worked with and participated with the Department of Labor in the handling of the mediation of these disputes? A. Yes, they did.

Q. So your previous answer is not entirely an accurate answer, that you and the Department of Labor are not associated in any way in the mediation of disputes? A. It is accurate to this extent, that the activities of the Labor Department that we were involved in occurred after the Board had concluded its mediatory efforts.

They were extracurricular activities.

Q. But the Mediation Board was still involved in them. Is that correct? A. Yes. Mr. O'Neill was involved in it, yes, sir.

Q. And the Mediation Board was kept rather
234 fully advised of the developments in those cases? A. The Mediation Board was in on all of the developments including the ones over at the White House.

Q. Now, Mr. Thompson, isn't it true that reporters were present at various stages of these negotiations? A. I don't know.

Q. You were never informed that they were? A. No, sir, I don't know.

Q. You don't know that they were or were not? You just don't know? A. You mean in the national negotiations?

Q. I mean in these—I don't know whether you call them negotiations or what the meetings should be called at the stage that the Department of Labor was involved in them.

I understand there were a series of these meetings but, whatever they were, isn't it true that some of those meetings were conducted with a reporter being present? A. I have no knowledge of it, Mr. Devaney. I don't know.

Q. Have you been informed in any way, Mr. Thompson, by any official of the Department of Labor that they have undertaken mediation in the presence of a reporter? A. No, sir, and I have no contact with the Department of Labor.

235 Q. Now, in your personal experience as a mediator, Mr. Thompson, have you had any occasions on which a reporter was present during negotiations or mediatory proceedings at any stage whatever in your own personal experience?

Mr. Shapiro: I object to that question on the ground that it relates to the performance of the witness' duties as a mediator and is privileged.

Mr. Devaney: This cannot possibly have any privileged character. Mr. Thompson has previously testified that he has not been a mediator since 1951.

Am I correct on that date, Mr. Thompson?

The Witness: I have been in the Secretary's position since 1951, right.

Mr. Shapiro: Well, subject to the objections that one might make as to competency, relevancy and materiality—of curse, under the rules we don't ordinarily make these in a deposition proceeding since they are not waived anyway—I will let Mr. Thompson answer in general terms if he can recall.

The Witness: I can't recall any case I ever mediated where a reporter was present.

By Mr. Devaney:

Q. Do you recall any instance when you were a mediator, Mr. Thompson, where a reporter had been used in
236 negotiations before you entered the picture as a mediator? A. I have no knowledge of what transpired during negotiations under normal conditions.

Q. Unless you happened to have been told? A. That's right, unless the file of the case indicates that that has been done.

Q. Now, again in your experience as a mediator do you know of any instance in which a reporter was asked by one or the other parties and objected to by the other party? A. Not in my experience as a mediator. I have never had an occasion of that kind.

Mr. Shapiro: Do you want to break for a few minutes, Mr. Devaney?

Mr. Devaney: All right.

(A short recess was taken.)

By Mr. Devaney:

Q. Mr. Thompson, earlier I asked you about the statement of the document that you referred to in Paragraph 2 of your affidavit which relates to a request, dated September 4, 1963, by the Brotherhood of Railroad Trainmen. Now, I hand you this document which purports to be a copy of your letter to Mr.—is that addressed to Mr.
237 Rutledge? I believe it is. A. Yes. What is your question?

Q. Would you look at that a moment, Mr. Thompson, and tell me whether you can ascertain from this document whether it appears to be a true copy of the original? A. Yes, it appears to be a true copy,—

Q. Now,— A.—but I didn't sign this letter, however.

Q. You did not sign the letter? A. No, sir.

Q. Who did sign it? A. Mr. Tracy, the Assistant Executive Secretary. I was out of the city when this transaction took place.

Q. But your name is— A. My name was on there, yes.

Q. Now, in looking at these documents you will note that on the letter, which is the next document here—this is a covering letter. This was the M.B. form— A. Yes, sir.

Q. —and on neither of these documents does there ap-

pear any date stamp showing the date that the request was received by the Mediation Board. A. No, there is none shown. That is right.

Q. Now, the last one is the Florida East Coast
238 notice and there is a date stamp showing the date that it was received. A. Yes.

Q. Now, Mr. Thompson, again I ask you is there any reason why the normal procedures were not followed in placing a date stamp on these documents when they were received by the Mediation Board, indicating that they were received by the Mediation Board? A. The answer is, and I can tell you, all applications and letters come into our Board in duplicate. That is one of our practices that everybody understands.

Apparently what has happened here is that a photostatic copy was made of the second copy of the application and letter and the date stamp obviously was placed only on the first copy.

Now, it looks like they didn't make a photostatic copy of the first copy of the letter of transmittal. So that is the only explanation I can give you as to evidently what happened.

Q. Now, when you say in your affidavit that on September 4th, 1963, the Brotherhood of Railroad Trainmen filed—and this does not indicate that you received that on September 4th, 1963, does it? A. Oh, no.

239 Q. In fact, the application indicates that—were they in Cleveland or St. Louis? Cleveland.

This is dated at Cleveland, Ohio, on September 4th. A. That's correct. That is what this affidavit says, that on September 4th they filed their application, and our date refers to the date on the application.

Q. And you have not indicated in your affidavit when that was actually received by the Mediation Board? A. No, sir.

Q. The only indication is that you notified the carrier on September 9, 1963? A. Yes, sir.

Q. And a copy of that is attached as Exhibit No. 2? A. That is right.

Mr. Devaney: I have no further questions at this time. We will, of course, Mr. Shapiro, reserve the right to proceed to obtain a court order requiring the answers to the various questions which you have instructed the witness to refuse to answer.

Mr. Shapiro: I think I have only one or two questions.

Examination by Counsel for Plaintiff

By Mr. Shapiro:

240 Q. Mr. Thompson, your statements respecting the assignment of mediators to particular cases are based upon your best recollection, is that right, without having the records in front of you? A. That is a general question. I guess my best answer to you is a general answer.

Yes, that is right.

Q. You were asked—strike that, please.

Does the Department of Labor participate in mediation matters which have been docketed with the National Mediation Board prior to the time the Board terminates its services? A. Never, as far as I know.

Q. All right.

Mr. Shapiro: I don't believe I have anything further, Mr. Devaney.

Mr. Devaney: No further questions.

Mr. Shapiro: We will reserve the right, under the rules, to review the testimony and correct it as to matters of—

Mr. Devaney: A typographical nature?

Mr. Shapiro: I believe as to substance also, Mr. Devaney.

Mr. Devaney: Mr. Shapiro declines to waive signature, so we will have it submitted for signature.

241 Mr. Shapiro: And we will also, of course, reserve our right under Rule 30(e) to make any changes as to form or substance which the witness desires to

make, with a statement of the reason given by the witness for making them.

This is provided for in the rule.

Mr. Devaney: All right.

(I have read the foregoing 49 pages which contain a correct transcript of the answers made by me to the questions therein recorded.)

EUGENE C. THOMPSON
(as corrected)

CERTIFCATE OF NOTARY PUBLIC

I, Thomas H. Doran, Jr., the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in stenotypy and thereafter reduced to typewriting under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken and, further, that I am not a relative or employee of any attorney or counsel employed by the parties
242 hereto, nor financially or otherwise interested in the outcome of the action.

THOMAS H. DORAN, JR.,
Notary Public in and for the District of Columbia

My commission expires
April 15, 1966.

Notary's fee $....., charged to attorney for defendant.

243 Filed May 26, 1964

Answer

FIRST DEFENSE

The complaint filed herein fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE

With respect to the numbered paragraphs of the complaint defendant answers as follows:

Count I

1. Defendant denies that this Court has jurisdiction under 28 U. S. C. § 1345.

2. Defendant admits the allegations contained in paragraph 2 of Count I.

3. Defendant admits the allegations contained in paragraph 3 of Count I.

4. Defendant admits the allegations contained in paragraph 4 of Count I, but further states that the labor organizations representing the other crafts or classes of its employees, numbering nine additional organizations and ten classes or crafts, have joined and participated in the strike and that their members have failed and refused, for the most part, to perform services since January 23, 1963.

244 5. Defendant admits that on September 24, 1963, it served a Section 6 notice on seventeen labor organizations but states that, while the list contained in Exhibit B to the complaint is substantially correct, it is in error in the following respects: notice was sent to the General Chairman, United Transport Service Employees (Red Caps) and to the General Chairman, United Transport Service Employees (Train Porters). Notice was not served

on System Federation No. 69, of the Railway Employees Department, AFL-CIO.

6. Defendant admits that on October 18, 1963, representatives of the defendant met with representatives of the seventeen labor organizations, the meeting having been called for the purpose of discussing defendant's Section 6 notice of September 24, 1963. Defendant further states that the representatives of all seventeen labor organizations refused to bargain and no conference on defendant's proposed Section 6 notice ever commenced. Defendant further admits that the organizations objected to the presence of a court reporter. Defendant denies each and every other allegation contained in paragraph 6 of Count I. Defendant further states that one organization, International Association of Railway Employees, changed its mind and later bargained and the rules contained in the September 24, 1963, Section 6 notice have not been placed into effect as to that organization.

7. Defendant admits that a letter dated October 23, 1963, was addressed to the National Mediation Board but denies that the application was received by the Board on October 23, 1963. Defendant further states that Exhibit 12 attached to the affidavit of Eugene C. Thompson bears a date stamp showing that the letter was received by the Board on October 28, 1963, and that Exhibit 10 attached to the affidavit of Mr. Thompson bears a date stamp showing that the telegram was received on October 25, 1963. Defendant admits that it, pursuant to a request from the Mediation Board on October 25, replied on October 25 that the organizations had refused to enter into collective bargaining as required by Section 2, First; that it was defendant's position that no provision of the Railway Labor Act prohibits the presence of a court reporter; that the organizations failed to fulfill their obligation to negotiate on defendant's notice and were therefore not in a position to avail themselves of the services of the Mediation Board;

and that defendant was free to place proposed rules into effect ten days after termination of the last conference for failure to negotiate as required by the Act. De-
245 fendant denies each and every other allegation con-
— tained in paragraph 7 of Count I of the complaint.

8. Defendant admits the allegations contained in paragraph 8 of Count I of the complaint and further states that Exhibit No. 15 attached to the affidavit of Eugene C. Thompson provides that "mediator will be assigned consistent with prior commitments"; however, no mediator has ever been assigned, although a mediator has been assigned in cases docketed after A-7055.

9. Defendant admits that it wrote a letter dated October 30, 1963, addressed to certain labor organizations in which it advised these organizations that defendant would place into effect as of October 30, 1963, the proposed agreement appended to its notice of September 24, 1963, because of these organizations' failure to bargain as required by the Railway Labor Act. Defendant further admits a copy was mailed to Mr. Eugene C. Thompson and that Exhibit 14 attached to Mr. Thompson's affidavit indicates it was received November 6. Defendant states, however, that its letter of October 30 was addressed to sixteen labor organizations and not seventeen as stated in this paragraph of the complaint (see Exhibit 14 attached to the affidavit of Eugene C. Thompson). Defendant further states that the letter of October 30, 1963, was not addressed to the International Association of Railway Employees and that the proposed agreement contained in the September 24, 1963, notice has not been placed into effect with respect to this organization. Dfendant denies each and every other allegation contained in paragraph 9 of Count I of the complaint.

10. Defendant admits the allegations contained in paragraph 10 of Count I of the complaint.

11. Defendant denies each and every allegation contained in paragraph 11 of Count I of the complaint.

12. Defendant denies each and every allegation contained in paragraph 12 of Count I of the complaint.

Count II

1. Defendant's answers to paragraphs 1 through 3 of Count I are incorporated herein in answer to the allegations contained in paragraph 1 of Count II which incor-
246 porates by reference paragraphs 1 through 3 of Count I of the complaint.

2. Defendant admits the allegations contained in paragraph 2 of Count II.

3. Defendant admits that a meeting was scheduled for August 29, 1963, with the representatives of the seventeen labor organizations, including Brotherhood of Railroad Trainmen, and that the purpose of this meeting was to negotiate concerning defendant's notice of July 31, 1963. Defendant states that the representatives of the seventeen unions refused to negotiate and that the scheduled meeting was terminated before any conference began. Defendant admits that the spokesmen for the seventeen unions stated that they objected to the presence of a court reporter. Defendant further states that it met separately with the representative of American Train Dispatchers Association who bargained on the July 31, 1963, Section 6 notice; and that the proposed termination of union shop agreement has not been made effective as to this organization.

4. Defendant is without knowledge or information as to when an application on behalf of the seventeen labor organizations concerning the July 31, 1963, notice was received and therefore denies the allegations contained in paragraph 4 of Count II of the complaint that it was received on September 6, 1963. Defendant states that the affidavit of Eugene C. Thompson states only that a letter dated September 4, 1963, was filed to which reply was made by the Mediation Board on September 9, 1963, advising de-

fendant of the receipt of this application; that Exhibit 5 attached to the affidavit of Eugene C. Thompson which purports to be a true copy of the original application as received by the Mediation Board shows that it was dated September 4, 1963, at St. Louis, Missouri. Exhibit 6 attached to the affidavit of Euguene C. Thompson is dated September 9, 1963, and would seem to indicate that the request for mediation was received that date. Defendant further states that the attachment to the application for mediation services entitled Appendix No. 1 lists only sixteen labor organizations even though the application was signed by Mr. Leighty on behalf of "seventeen cooperating railway organizations". Defendant admits that it advised the Mediation Board by letter dated September 13, 1963, in response to the Board's letter of September 9, 1963,
247 that because the unions had refused to enter into collective bargaining on its notice of July 31, 1963, as required by the provisions of the Railway Labor Act, the termination of the unions' shop agreement had become effective and that the organizations could not now invoke mediatory services of the Board. Defendant denies each and every other allegation contained in paragraph 4 of Count II of the complaint.

5. Defendant admits that by letter dated September 9, 1963, it advised the labor organizations to whom it had addressed its Section 6 notice of July 31, 1963, except American Train Dispatchers Association, that as of September 9, 1963, the union shop agreement was cancelled because of the organizations' refusal to bargain concerning defendant's Section 6 notice of July 31, 1963. Defendant further states that whether or not the Union Shop Agreements have been cancelled, such agreements were not enforceable during the strike and particularly in view of the discrimination practiced against employees hired since January 23, 1963, or who have returned to work since that date, which practices are in violation of the provisions of

the Railway Labor Act. Defendant denies each and every other allegation contained in paragraph 5 of Count II of the complaint.

6. Defendant admits the allegations contained in paragraph 6 of Count II of the complaint and further states that no mediator was ever assigned, even though a mediator has been assiged in cases docketed after A-7027.

7. Defendant admits that by letter dated October 15, 1963, defendant advised the Board, as it had previously on September 13, 1963, that it considered the Union Shop Agreements cancelled because of the unions' refusal to bargain as required by the Railway Labor Act.

8. Defendant denies each and every allegation contained in paragraph 8 of Count II of the complaint.

9. Defendant denies each and every allegation contained in paragraph 9 of Count II of the complaint.

Count III

1. Defendant's answer to paragraphs 1 through 3 of Count I are incorporated herein in response to para-
248 graph 1 of Count III which incorporates by reference the allegations contained in paragraphs 1 through 3 of Count I of the complaint.

2-3. Defendant admits the allegations contained in paragraphs 2 and 3 of Count III of the complaint.

4. Defendant admits that the services of the Mediation Board were invoked by the unions and that the case was docketed as Case No. A-6627, Sub. No. 1, and that mediation was unsuccessful. Defendant states that the unions rejected arbitration and that the Board on October 22, 1962, advised the parties that it was terminating its services. Defendant further states that despite the repeated requests of the company the Mediation Board refused to recommend the creation of an Emergency Board. Defend-

ant denies each and every other allegation contained in paragraph 4 of Count III of the complaint.

5. Defendant admits that it gave notice to each of its employees individually that if the strike, which had been called by the eleven cooperating non-operating organizations, took place as scheduled, his position would be abolished one minute after the strike began. Defendant denies each and every other allegation contained in paragraph 5 of Count III of the complaint.

6. Defendant admits the allegations contained in paragraph 6 of Count III of the complaint.

7. Defendant admits that picket lines were established and that all operating and non-operating employees refused to cross the picket lines. From January 23, 1963, until February 3, 1963, all operations of the company were completely closed down by the strike. On February 3, 1963, defendant operated its first train with supervisory employees. Thereafter, defendant re-established positions and bulletined them in accordance with requirements of the various union agreements. All employees, both those on strike and those who joined and participated in the strike by honoring picket lines, were given the opportunity to bid these jobs. Defendant denies each and every other allegation contained in paragraph 7 of Count III of the complaint.

8. Defendant admits that it operated its first train on February 3 with supervisory personnel. Jobs were
249 bid and all employees were given an opportunity to bid for jobs. Some of the striking employees and some employees who honored the picket lines exercised their right to bid these jobs.

9. Defendant denies each and every allegation contained in paragraph 9 of Count III of the complaint, and states that the strike which commenced on January 23, 1963, suspended operation of agreements during the pendency of

said strike; that the strike created emergency conditions which authorized and permitted Florida East Coast to use the manpower available to it in whatever manner required to provide service to the public.

10. Defendant denies each and every allegation contained in paragraph 10 of Count III of the complaint and states that the document distributed on or about September 1, 1963, entitled "Conditions of Employment" was merely the written embodiment of rules and practices which defendant had been compelled, by the strike, to follow from February 3, 1963, in order to provide service to the public. Defendant admits that these practices were different from the practices contained in the agreements with the various labor organizations but states that the strike and the total withdrawal of manpower made operation under those agreements impossible and during the period of said stirke such agreements were suspended and defendant is free during the period of the strike to utilize the manpower available in whatever manner is required to provide service to the public. Defendant further states that its operation under conditions imposed by the strike did not in any way affect or change any agreement with any labor organization and that the labor organizations were free at any time to return to work, in which event they would have returned under the terms of their agreement. Defendant further states that on September 24, 1963, it gave a Section 6 notice of intent to place into effect an agreement entitled "Uniform Working Agreement"; that the organizations refused to bargain concerning the carrier's Section 6 notice and that because the organizations, in violation of their duty under the Railway Labor Act, refused to bargain the carrier properly placed this agreement into effect on October 30, 1963.

11. Defendant denies each and every allegation
250 contained in paragraph 11 of Count III of the complaint and states that from September 1, 1963, until on or about October 30, 1963, it did require each employee to sign for a copy of the document entitled "Conditions of

Employment", which signified his willingness to work thereunder; and that since on or about October 30, 1963, it has required employees hired after that date to sign for a copy of the "Uniform Working Agreement" which became effective on October 30, 1963, and his signature signified his willingness to work thereunder.

12. Defendant denies each and every allegation contained in paragraph 12 of Count III of the complaint.

13. Defendant denies each and every allegation contained in paragraph 13 of Count III of the complaint.

THIRD DEFENSE

The labor organizations listed in Exhibits A, B and C to the complaint which have union shop agreements have, since January 23, 1963, rendered said agreements null and void and unenforceable by their various acts of discrimination against employees of defendant.

FOURTH DEFENSE

Defendant on July 31, 1963, gave a Section 6 notice to the labor organizations listed in Exhibits A, B and C to the complaint, except System Federation 69, of desire to terminate union shop agreements and that said organizations, except American Train Dispatchers Association, refused to bargain and on September 9, 1963, defendant validly cancelled the union shop agreements of said organizations for their failure to bargain as required by the Railway Labor Act.

FIFTH DEFENSE

On September 24, 1963, defendant gave a Section 6 notice of desire to place into effect a new working agreement entitled "Uniform Working Agreement". The organizations listed in Exhibit A, B and C to the complaint, except the International Association of Railway Employees,
251 refused to bargain and, on or about October 30, 1963, defendant validly placed into effect said agreement

in view of the failure of the organizations to bargain as they are required to do by the provisions of the Railway Labor Act. Defendant has not placed into effect said "Uniform Working Agreement" with respect to the International Association of Railway Empolyees.

Sixth Defense

The Section 6 notices of July 31, 1963, and September 24, 1963, were both validly placed into effect following the unions' refusal to bargain as required by the provisions of the Railway Labor Act. Because the changes contained in these two Section 6 notices were validly placed into effect, the Mediation Board has no jurisdiction; however, even if the National Mediation Board had jurisdiction, the failure and refusal of the National Mediation Board to fulfill its obligations under the Act by (a) promptly assigning a mediator, and (b) using its best efforts to bring the parties to agreement, as required by Section 5, First, of the Railway Labor Act, and the failure and refusal of the National Mediation Board to terminate its services if it has found that its mediatory efforts have failed to bring about agreement, authorized the carrier to place the changes into full force and effect by reason of the Board's dereliction of its duties as imposed by the Railway Labor Act. Because the labor organizations refused to bargain as required by the Railway Labor Act, and because the National Mediation Board has failed and refused to perform the acts imposed upon it by the Act, the changes contained in the July 31 and September 24 Section 6 notices are validly in effect.

Seventh Defense

The unions listed in Exhibits A, B and C to the complaint have disclaimed any representative status of employees of Florida East Coast working during the period of the strike and said organizations have disqualified themselves from representing employees of Florida East Coast working during the strike.

252 EIGHTH DEFENSE

The complaint alleges that defendant has refused and is failing to comply with existing collective bargaining agreements and the Court is without jurisdiction to adjudicate these issues since Sec. 3 of the Railway Labor Act lodges exclusive jurisdiction over all matters involving the interpretation and application of agreements in the National Railroad Adjustment Board (45 U.S.C. § 153).

NINTH DEFENSE

This case involves a labor dispute between private parties and the United States is barred by the Norris-La Guardia Act (29 U.S.C. § 101 et seq.) from resorting to injunctive process in such private dispute.

TENTH DEFENSE

Defendant on July 31, 1963, and on September 24, 1963, served notices under Section 6 of the Railway Labor Act and the labor organizations, on whose behalf or benefit this action is brought, refused to bargain. Accordingly, injunctive relief is barred by Section 8 of the Norris-La Guardia Act (29 U.S.C. § 108).

WHEREFORE, defendant prays that:

A. The relief prayed for by plaintiff be denied and the complaint dismissed;

B. The Court enter its declaratory judgment declaring that the defendant was entitled to and did place the Section 6 notices of July 31, 1963, and September 24, 1963, lawfully into effect when the organizations refused to bargrain and that the collective bargaining agreements between defendant and the organizations listed in Exhibits A, B and C to the complaint are validly modified in accordance with the terms of said notices except that the July 31, 1963, Section 6 notice has not been placed into effect with respect to the American Train Dispatchers As-

sociation and the September 24, 1963, Section 6 notice has not been placed into effect with respect to the Inter-
253 national Association of Railway Employees.

FLORIDA EAST COAST RAILWAY COMPANY

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Date: May 25, 1964

STATE OF FLORIDA }
COUNTY OF DUVAL } ss.

BEFORE ME, the undersigned authority, personally appeared R. W. WYCKOFF, who, being first duly sworn, deposes and says: That he is Vice President and Director of Personnel of defendant; that he has read the foregoing Answer and that the facts stated therein are true.

R. W. WYCKOFF
R. W. Wyckoff

SWORN TO AND SUBSCRIBED before me, this 25th day of May, 1964.

BLANCHE B. REEVES
Notary Public,
State of Florida at Large

My commission expires: May 7, 1968

255 Filed May 26, 1964

Motion to Dismiss Complaint

Defendant, Florida East Coast Railway Company, moves the Court as follows:

1. To dismiss the action on the ground that the Court lacks jurisdiction because plaintiff lacks standing to litigate and there is no case or controversy existing between plaintiff and defendant within the meaning of Article III, Section 2, of the United States Constitution.

2. To dismiss the action on the ground that the plaintiff is not the real party in interest within the meaning of Rule 17(a) of the Federal Rules of Civil Procedure.

3. To dismiss the action on the ground that the Court lacks jurisdiction to grant the relief requested by virtue of Sections 2 and 3 of the Railway Labor Act, 45 U.S.C. 152 and 153, and Sections 1, 7 and 8 of the Norris-La Guardia Act, 29 U.S.C. 101, 107 and 108.

Signed WILLIAM B. DEVANEY
Attorney for Defendant
Address: 1100 Shoreham Bldg.,
Washington 5, D. C.

Signed J. TURNER BURTON
Attorney for Defendant
814 Florida Title Bldg.,
Jacksonville, Fla.

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256 **Memorandum in Support of Motion to Dismiss Complaint**

1. In its complaint herein the United States of America alleges that this Court has jurisdiction under 28 U.S.C. 1345, which provides that the District Court shall have original jurisdiction of cases in which the United States

is plaintiff. It is well established, however, that no action may be brought in a Federal Court where plaintiff's interest is not sufficient to satisfy the Constitutional requirement that there be a "case" or "controversy."[1] The complaint shows on its face that plaintiff lacks such an interest, and thus lacks standing to litigate this case. The complaint shows that the United States is suing as representative of the labor organizations listed in plaintiff's Exhibits A, B and C appended thereto. Plaintiff attempts to justify its action on behalf of one of the parties to a private labor dispute as follows:

> "This is a matter of the greatest public concern, not only because it has resulted in a continuing strike that carries with it disruption, and a constant potentiality of greater disruption to interstate commerce, but because such a wholesale avoidance of the constructive collective bargaining which the Act is supposed to ensure destroys as well the effectiveness of the nation's railway labor policy."[2]

257 It is, or should be apparent, that noble words will not give the Government standing in this case. If there actually were a serious "disruption" of interstate commerce as was presented in the case of *In re Debs,* 158 U.S. 564 (1895), cited by the Givernment, perhaps the United States would have standing to sue under the Commerce Clause of the United States Constitution. See also *United States* v. *Brotherhood of Railroad Trainmen,* 96 F. Supp. 428 (N.D. Ill. 1951). But the Government cannot allege that in the instant case it has standing to sue under the Commerce Clause. Moreover, the Supreme Court has specifically held that the Norris-La Guardia Act (29 U.S.C. 101 et seq.) barred the intervention of the

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[1] *Tileston* v. *Ullman,* 318 U.S. 44 (1943); *Frothingham* v. *Mellon,* 262 U.S. 447 (1923).

[2] Memorandum in Support of Preliminary Injunction, pp. 20-21.

United States in labor disputes between private parties, *United States* v. *United Mine Workers of America*, 330 U.S. 258, 277-78. Consequently, when, as here a labor dispute between private parties is involved, cases such as *In re Debs* have no application.

Nevertheless, even if a suit by the United States were not barred by the Norris-La Guardia Act, the instant suit would not be proper because the Government does not have standing to sue under the Commerce Clause.

On the facts here, there is neither disruption nor potential disruption to interstate commerce. As is shown by the record in *Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen*, C.A. 64-40-Civ.J., Court of Appeals No. 21,356, a case now submitted on appeal to the United States Court of Appeals for the Fifth Circuit, the allegation that there has been a disruption of interstate commerce is patently false. As the affidavit of Winfred L. Thornton in that case states,

> "This graph (J.A. 47, 48) shows that the traffic now being handled by the railway well exceeds the traffic at the end of the year 1963 and further is approximately 95% of the traffic handled in January, 1962." (J.A. 44).

Where, then, is the disruption of interstate commerce? Does a strike called by a union constitute a disruption of commerce by the employer? Does an alleged violation of the Railway Labor Act constitute a disruption of commerce, *per se*? If these questions be answered "yes," the United States may become a party to any labor dis-
258 pute merely by alleging that a strike has been called or an act violated, *quid absurdum est.*

Since there is clearly no disruption of interstate commerce, the Government's true position is that it has a right to bring this action to protect "the effectiveness of the

nation's railway labor policy."[3] A similar contention was disposed of by judge Lewis in *Allen* v. *County School Board*, 28 F.R.D. 358 (D.C. E.D. Va. 1961) as follows:

> "The Attorney General cites numerous cases in support of his contention that the United States by virtue of its national sovereignty has a sufficient general interest in this case to be permitted to intervene of right. Suffice it to say that none of the cited cases are sufficiently in point with the facts in this case to sustain his contention.
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> " 'It is well settled that the only interest which will entitle a person to the right of intervention in a case is a legal interest as distinguished from interests of a general and indefinite character which do not give rise to definite legal rights.' See Jewell Ridge Coal Corp. v. Local No. 6167, etc. (D.C.), 3 F.R.D. 251. See also Radford Iron Co. Inc. v Appalachian Electric Power Co. (4 Cir.), 62 F. 2d 940."

The Government cites as authority *In re Debs, supra, United States* v. *American Bell Telephone Company*, 128 U.S. 315 (1888) and *the United States* v. *City of Jackson*, 318 F. 2d 1, 11-16, *rehearing denied*, 320 F. 2d 870 (1963). All three cases base the standing of the Government to sue on the doctrine that,

> "The Commerce Clause in itself prohibits obstruction to interstate commerce and that the United States has standing to sue for injunctive relief to enforce the Commerce Clause."[4]

In the present case, no such obstruction can be shown to exist, and plaintiff's authorities are therefore inapplicable.

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[3] Concededly, there is no statutory authorization in the Railway Labor Act which permits the United States to bring an action like the present one.

[4] 318 F. 2d, p. 14.

It may be plaintiff's position that any alleged *future* violation of the Railway Labor Act constitutes a violation of the Commerce Clause sufficient to give the United States standing to sue. As the Government states at pages 21-22 of its Motion for Preliminary Injunction:

259 "In the instant case it is evident that a breakdown in the functioning of the National Mediation Board or of the collective bargaining process as required by the Railway Labor Act, due to the behavior of the railroad subject to the Act, imperils the free flow of commerce."

The key word in this statement is "imperils". In this case there is no *present* obstruction. Can the Government obtain standing to sue merely by alleging that there is a *threat* or *peril* of obstruction to interstate commerce? For the Court to adopt this novel and unprecedented position would be to go one giant step beyond *U.S.* v. *City of Jackson, supra,* which based standing to sue not on any possible threat or peril to interstate commerce, but on a finding that a present obstruction of interstate commerce existed.[5] In the present case, by contrast, no such finding of fact is possible.

Therefore, since the Governemnt's complaint shows that there is no present obstruction to interstate commerce, and since the Government has no proprietary interest of any kind in the present action,[6] it has no standing to litigate, and this case should be dismissed for lack of existence of a case or controversy.

2. 28 U.S.C. 1345 gives the Court no jurisdiction over the instant case if the United States is not the "true party in interest" within the meaning of Rule 17(a) of the Fed-

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[5] *Ibid.*, p. 15.

[6] *Cf. United States* v. *San Jancinto Tin Company*, 125 U.S. 273 (1888).

eral Rules of Civil Procedure.[7] The true parties in interest in this case are the labor organizations listed in Exhibits A, B, and C to the complaint, eleven of which filed a petition to intervene on May 7, 1964.

The three counts of the complaint allege that, by placing into effect the Section 6 notices of September 24, 1963, and July 31, 1963, and distribution of a document entitled, "Conditions of Employment", on September 1, 1963, Florida East Coast Railway Company violated Section 2, First, Second and Seventh, Section 5, and Section 6 of the Railway Labor Act, 45 U.S.C. Section 152, First, Second and Seventh, Section 155 and Section 156. When
260 summarized, these charges boil down to two: (a) that by operating during the strike with the manpower available as its needs required, FEC unilaterally changed rules and working conditions in violation of the Railway Labor Act; and (b) that FEC failed to bargain in good faith with the unions (a remarkable assertion since plaintiff admits that the unions refused to bargain) and unilaterally changed rules and working conditions in violation of the Railway Labor Act.

As discussed hereinafter in Paragraph 3, any question concerning the interpretation and application of an existing agreement is reserved by the Act to the exclusive jurisdiction of the Adjustment Board and this Court is without jurisdiction as to such matter.[8] Nevertheless, if there is injury to anyone because of FEC's alleged failure to bargain or FEC's allegedly unlawful unilateral changes, that injury is to the unions, not to the United States. As the unions themselves state in their Motion to Intervene herein,

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[7] *United States ex. rel. State of Wisconsin* v. *First Federal Savings & Loan Association*, 248 F. 2d 804 (7th Cir. 1957), cert. denied 355 U.S. 957 (1958).

[8] Aaxico v. Airlines Pilots Association, —— F. 2d ——, 55 LRRM 2982, (5th Cir. 1964).

> ". . . they represent the employees of the defendant whose rights are the subject matter of the plaintiff's complaint and they are the contracting parties, with the defendant, to the collective bargaining agreements which are the subject matter of the main action . . ."

That the unions are the true parties in interest is further revealed by analysis of the Government's complaint. Count II, for example, charges that FEC unlawfully cancelled the union shop agreement by placing into effect on September 9, 1963, the proposal to this effect contained in its notice of July 31, 1963. Clearly, if the union shop agreement is void and unenforceable as to the unions because of discrimination by the unions against strike replacements, the United States cannot be permitted to enforce this agreement on behalf of the unions. And, indeed, as shown by the argument in *Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen,* Court of Appeals No. 21,356, Brief for Appellant, pages 42-49, this is a major issue in the dispute as to whether the union shop agreement was properly cancelled. Even if, as the Government alleges, FEC, in cancelling the union shop agreement, acted in blatant disregard of the National Mediation Board's jurisdiction, discrimination by the union would render the agreement unenforceable and moot
261 the Government's case. Obviously, the proper parties to this dispute are the unions and the company, and the Government has no place in it.

Similarly, Count III of the complaint charges that in entering into individual contracts with the strike replacements differing from the collective bargaining agreements existing prior to the strike, and by distributing a document entitled "Conditions of Employment", on September 1, 1963, FEC violated the Railway Labor Act. This is an almost grotesque attempt to characterize an alleged breach of contract as a violation of the Railway Labor Act, so as to make it seem that the union's interest is also the public

interest. Obviously, as was argued in *Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen*, Court of Appeals No. 21,356, Brief for Appellant, pages 20-36, if the strike suspended the operation of the collective bargaining agreements, all temporary arrangements made by the company with the strike replacements during the pendancy of the strike would be entirely lawful. The proper parties to argue the question whether or not the collective bargaining agreement was suspended or was violated are the company and the unions. This seems too clear to merit discussion.

Finally, Count I of the complaint alleges that FEC violated the Railway Labor Act in putting into effect on October 30, 1963, the rules changes proposed by a Section 6 notice on September 24, 1963. FEC's position with regard to said action, as previously argued in *Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen*, Court of Appeals No. 21,356, Brief for Appelant, pages 46-49, is that refusal by the unions to bargain in good faith with respect to these changes gave the company the right to put them into effect. The central question in this dispute is whether, as asserted by the Government, FEC's insistence upon the presence of a reporter at the bargaining sessions was tantamount to a bad faith refusal to bargain, or whether, as contended by FEC, the union's refusal to meet in the presence of a reporter, was evidence of the duty to bargain, on their part. The proper parties to this dispute, are the company and the unions.

262 The present case, therefore, presents a clear example of the United States gratuitously attempting to protect the interests of a group perfectly capable of defending itself, under the guise of protecting the "public interest." The eleven unions who moved to intervene on May 7, 1964, are undoubtedly true parties in interest within the emaning of Rule 17(a) of the Federal Rules of Civil Procedure. Plaintiff's action should therefore be dismissed.

3. Even if the United States has standing to bring this action, the Court is deprived of jurisdiction over the subject matter thereof by the Railway Labor Act, Sections 2 and 3 (45 U.S.C. 152 and 153) and the Norris-La Guardia Act, Sections 1, 7 and 8 (29 U.S.C. 101, 107 and 108).

(a) The Railway Labor Act distinguishes sharply between disputes "concerning changes in rates of pay, rules, or working conditions" (45 U.S.C. 155, *First*, (2)) and disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . ." (45 U.S.C. 153, *First*, (i)). Disputes of the first class, sometimes called "major", which "look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past"[9] may be referred to the National Mediation Board pursuant to Section 6 of the Act. Disputes of the second class, often called "minor", which "contemplate(s) the existence of a collective agreement already concluded" and which "relate(s) either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case,"[10] are committed to the *exclusive jurisdiction* of the National Railroad Adjustment Board.[11] This means that insofar as a complaint seeks enforcement of a collective agreement alleged to have been violated, a

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[9] *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 325 US 711 at 722-23 (1945).

[10] *Id.*

[11] Hettenbaugh v. Airline Pilots Association, 189 F. 2d 319 (5th Cir. 1951); Fingar v. Seaboard Air Line Railroad Co., 277 F. 2d 698 (5th Cir. 1960); Britton v. Atlantic Coast Line Railroad Co., 303 F. 2d 274 (5th Cir. 1962); King v. Atlantic Coast Line Railroad Co., 323 F. 2d 1005 (5th Cir. 1963); St. Louis, S.F. & T. Ry. Co. v. Railroad Yardmasters of America, ... F. 2d ...., 55 LRRM 2583 (5th Cir. 1964) rev'g, 218 F. Supp. 193 (N.D. Tex. 1963); Aaxico v. Airlines Pilots Association, —— F. 2d ——, 155 LRRM 2982 (5th Cir. 1964.)

federal court has no jurisdiction to grant such relief.
263 As the Court stated in *Hettenbaugh* v. *Airline Pilots Association,*[12]

> "The Congress did not, by the Railway Labor Act, grant jurisdiction to the Federal courts to afford relief for breaches of performance of collective bargaining agreements. Appropriate quasi-judicial tribunals have been established for that purpose. *Slocum* v. *Delaware, L. & W. R. Co.,* 339 US 239, 70 S. Ct. 577, 94 L. Ed. 775."

The complaint of the United States in the instant case shows on its face that it seeks, in large part, to enforce performance of a collective bargaining agreement. Count III of the complaint, paragraphs 9, 10, 11, and 12, alleges that FEC has violated various sections of the Railway Labor Act in entering into individual agreements with its employees, most of whom are strike replacements, during the period of the strike, since said individual agreements are not drawn in accordance with the provisions of the collective bargaining agreements in force with respect to the employees now on strike. Count III also alleges that distribution of a document entitled "Conditions of Employment" to employees working during the strike period violated the Railway Labor Act since said "Conditions of Employment" differ from the provisions of the collective bargaining agreements in force with respect to employees on strike. *This count alleges nothing more than breach of contract.* The United States does not, and cannot suggest that the processes of the Railway Labor Act to be utilized in the case of a major dispute have any applicability in this instance, nor is the jurisdiction of the National Mediation Board over this dispute even suggested. Indeed, Counsel for the Government in an ancillary pro-

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[12] 189 F. 2d at 321.

ceeding on a motion to Quash Subpoenas, D.C.D.C. misc. Docket No. 10-64 stated as follows:

> "The first, temporary conditions of employment has no relationship to the National Mediation Board since the board was never—since a Section 6 notice was never served and that, therefore, the Board's processes have never been invoked". (Transcript of Proceedings before the Honorable Edward M. Curran, U.S. Dist. Judge, Monday, May 18, 1964, p. 6).

It is FEC's position that the strike by the eleven non-operating organizations suspended the operation of the collective bargaining agreements by making com-
264 pliance therewith impossible; but whether or not FEC is correct in adopting this position, *the extent to which the company is bound by a pre-existing collective agreement is obviously a matter within the exclusive jurisdiction of the NRAB.*

Counts I and II of the complaint appear on the surface to arise out of a "major dispute" between the company and the unions in that they allege that FEC, after properly giving the Section 6 notices of September 24, 1963 ("Uniform Working Agreement") and July 31, 1963 ("Cancellation of Union Shop"), unlawfully refused to bargain by insisting upon the presence at the negotiations of a court reporter, and unlawfully placed the proposed changes into effect by so informing the labor organizations although, in each case, the National Mediation Board had assumed jurisdiction. But the Government's prayer for relief goes further; it asks that "the defendant Florida East Coast Railway Company . . . be restrained from (a) in any manner continuing in effect or implementing in any respect the changes in rates of pay, rules or working conditions announced in its notices of September 24, 1963, and July 31, 1963. . . . (b) taking any action under any further notice attempting to make changes in rates of pay, rules or work-

ing conditions, except in accordance with the procedures of § 6 of the Railway Labor Act.'"[13] Consequently, it is clear from the prayer that this is not a request for an injunction against alleged violations of the Act, but for immediate enforcement of pre-existing collective bargaining agreements. In order to enjoin FEC from taking any further action under its Section 6 notices or from issuing new notices, the Court must find that the collective agreements have not been suspended by the strike but are presently in force. Obviously a declaratory judgment or injunction which restrains FEC from acting contrary to the terms of the collective agreements *at the present time* enforces said agreements over FEC's objection that they are not now in effect. Clearly, a determination as to the applicability of the collective agreements is within the
265 exclusive jurisdiction of the NRAB, and may not be made by this Court.[14]

(b) The Norris-La Guardia Act, which is not adverted to anywhere in the Government's complaint, motion for preliminary injunction, or memorandum in support of said motion, clearly bars injunctive relief in this case, whatever other alternatives by way of relief may be available. The United States concedes that it has no proprietory interest in this case, but is attempting only to defend the "public interest" (Memorandum in Support of Motion for Preliminary Injunction pp. 20-22). This is precisely the type of action by the Government which the Supreme Court, in *United States* v. *United Mine Workers of America*,[15] expressly held to be barred by the Norris-La Guardia Act:

> "In the debates in both Houses of Congress numerous references were made to previous instances in which

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[13] Complaint, p. 10.

[14] Aaxico v. Airlines Pilots Association, —— F. 2d ——, 55 LRRM 2982 (5th Cir. 1964). See also other cases cited in n.11 to the same effect.

[15] 330 US 258, 277-278.

> the United States had resorted to the injunctive process in labor disputes between private employers and private employees, where some public interest was thought to have become involved. These instances were offered as illustrations of the abuses flowing from the use of injunctions in labor disputes and the desirability of placing a limitation thereon. The frequency of these references and the attention directed to their subject matter are compelling circumstances. *We agree that they indicate that Congress, in passing the Act, did not intend to permit the United States to continue to intervene by injunction in purely private labor disputes."* (Emphasis supplied).

This is a "private labor dispute" between FEC and the labor organizations named in Exhibits A, B and C appended to the complaint herein. Allegations of a public interest in the outcome of the dispute do not make it any the less a private dispute within the meaning of *United Mine Workers, supra.*

The language of Section 7(29 U.S.C. 107) of the Norris-La Guardia Act shows clearly that the United States was not intended to escape the purview of the Act by allegations of "public interest":

> "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined . . . except after findings of fact by the court, to the effect—
>
> * * *

266 (b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief . . ."

Neither of these findings can properly be made by the Court in the instant case. As pointed out above, there can be no showing by the United States that "substantial and irreparable injury" to its property will follow if injunctive relief is not granted Section 7(b) of the Act, since no property of the United States is involved. Moreover, there can be no showing in accordance with Section 7(c) that greater injury will be inflicted upon the United States by denial of relief than will be inflicted on the FEC by the granting of relief, since the United States Court of Appeals for the Fifth Circuit granted defendant's motion to stay the preliminary injunction issued in *Brotherhood of Railroad Trainmen* v. *Florida East Coast Railway Company*, C.A. 64-40, pending appeal.[16] Defendant's motion was granted on the basis of evidence, *inter alia*, that adherence at the present time to collective bargaining agreements in force before the beginning of the strike would virtually force the railroad out of business. Since the injunction requested by the United States in the present case would have the same effect it is *res judicata* that such an injunction will cause irreparable injury to the defendant and to its public which it serves.

Even if it were to be held that the Norris-La Guardia Act does not, *ipso facto* bar the United States from bringing such a "public interest" action as this, the Court would be unable to make the further findings required by Section 7(a) and (d) of the Act, and injunctive relief must still be denied. Absent the finding (which the Court has no power to make) that all collective agreements between Defendant and the labor organizations remain in force during the strike, the Court cannot find that "unlawful acts" within the meaning of Section 7(a) are now being committed or will be committed in the immediate future unless restrained. If, as contended by defend-

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[16] Motion granted, *Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen*, Court of Appeals No. 21,356, March 14, 1964.

ant, the collective agreements are now in suspension, the only possible unlawful acts by defendant could occur after the strike ends. At this time the Government alleges only contract violations, which are not "unlawful acts" within the meaning of Section 7(a) of the Norris-LaGuardia Act.[17] As the Court said in *BRT* v. *Central of Georgia Ry. Co.*,

> "It is plain from the language and the context that the words 'unlawful acts' mean violence, breaches of the peace, criminal acts, etc., and that such terms do not include, they do not constitute a general reference to, anything that may be considered illegal but apply specifically to the acts of violence which authority is calculated to control."[18]

For similar reasons, there is an "adequate remedy at law" within the meaning of Section 7(d) in proceedings before the National Railroad Adjustment Board.

Finally, the United States is barred from bringing the present action by Section 8 of the Norris-La Guardia Act, which states:

> "*No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question,* or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available Government machinery of mediation or voluntary arbitration." (Emphasis supplied).

The United States bases its case in large part on the necessity which it feels for protecting the jurisdiction of the

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[17] United Packing House Workers of America v. Wilson & Co., 80 F.Supp. 563 (N.D.Ill. 1948); BRT v. Central of Georgia Ry. Co., 229 F. 2d 901 (5th Cir. 1956) vacated, remanded for dismissal because of mootness, 243 F. 2d 793 (5th Cir. 1957); Wilson & Co. v. Birl, 105 F. 2d 948 (3rd Cir. 1939).

[18] 229 F. 2d at 905.

National Mediation Board, whose functions are allegedly being frustrated by the actions of FEC.[19] But it is the National Mediation Board rather than the railroad which has failed to comply with its obligations under the Railway Labor Act. Section 5, *First*, of the Railway Labor Act directs that where the jurisdiction of the National Mediation Board is invoked by a party to a dispute, or
268 where the National Mediation Board proffers its services,

> "in either event the said board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement."

This section creates a duty on the part of the National Mediation Board to communicate promptly with the parties and to assign a mediator with reasonable speed. This duty the Board has flagrantly violated.

Defendant does not contend that Section 5, *First*, of the Railway Labor Act should be read so as to impose a rigid time-table on the Board. Defendant does contend the section has meaning and, at the very least, requires the National Mediation Board to offer sound and sufficient reasons for its failure to act promptly with regard to disputes between defendant and the various unions docketed by it since April 30, 1962, and not acted upon,[20] when, at the same time, the Board has communicated with the parties and appointed mediators in other disputes docketed by it much more recently. These facts raise an inference, first, that the Board, for reasons known only to itself, has failed to comply with the duty imposed upon it by Section 5, *First*, of the Act, and second, that the Board is discriminating

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[19] Complaint for Injunction, pp. 2, 3, 4, 5, 6, 10.

[20] A list of disputes docketed betwen FEC and various labor organizations docketed by the National Mediation Board, and correspondence thereon between R. W. Wyckoff and F. A. O'Neill, Jr., appended to this motion as Exhibit A.

in violation of the Fifth Amendment to the United States Constitution. Since the United States does not come to this Court with clean hands, both Section 8 of the Norris-La Guardia Act and general equitable principles deprive the Court of jurisdiction over any claim by the United States for injunctive relief.

269 WHEREFORE, for the foregoing reasons, defendant respectfully prays that the complaint of the United States of America be dismissed.

FLORIDA EAST COAST RAILWAY COMPANY

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Dated: May 25, 1964

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270 Filed May 26, 1964

Motion to Dismiss Complaint of Intervenors and to Deny Motion to Intervene

Comes now defendant, Florida East Coast Railway Company, and moves the Court as follows:

1. To dismiss the complaint of intervenors and to deny their motion to intervene on the ground that the Court

lacks jurisdiction over the subject-matter thereof by virtue of Sections 2 and 3 of the Railway Labor Act, and Sections 1, 7 and 8 of the Norris-La Guardia Act.

2. To dismiss the complaint of intervenors and to deny their motion to intervene on the ground that the principal action in this case must be dismissed for want of jurisdiction and because it is not prosecuted in the name of the true party in interest.

3. To dismiss the complaint of intervenors and to deny their motion to intervene on the ground that intervention in the instant case is permissive in nature and would result in delay and complication of the case to the prejudice of defendant's rights.

Signed: WILLIAM B. DEVANEY
Attorney
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Wash. 5, D. C.

Signed: J. TURNER BUTLER
Attorney for Defendant
Address: 814 Florida Title Bldg.
Jacksonville, Florida

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271 **Memorandum in Support of Motion to Dismiss Complaint of Intervenors and to Deny Motion to Intervene**

1. For reasons advanced in defendant's memorandum in support of motion to dismiss the principal complaint herein, the Court lacks jurisdiction over the subject-matter of intervenors' complaint.

The relief requested by intervenors in their complaint herein is identical to that requested by plaintiff the United States of America in its principal complaint.[1] Since, as

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[1] Complaint of Intervenors, pp. 4-5; Complaint of United States, pp. 10-11.

has been shown,[2] the granting of such relief would amount to the enforcement of existing collective agreements and would depend upon the interpretation and application of existing collective agreements, the Court's jurisdiction is withdrawn by Sections 2 and 3 of the Railway Labor Act, which commit the decision of such questions to the exclusive jurisdiction of the NRAB.

Moreover, as in the case of the principal complaint herein, the Norris-La Guardia Act, Sections 1, 7 and 8, bars the injunctive relief requested. The findings required by Section 7 of the Norris-La Guardia Act cannot be made by this Court for the following reasons:

(a) allegations of contract violations are not unlawful acts within the meaning of Section 7(a);[3]

272 (b) it is *re judicata* that greater injury will be inflicted upon FEC by granting of relief than will be inflicted on the unions by denial of relief (see Section 7(c));[4] and

(c) intervenors have a plain and adequate remedy at law within the meaning of Section 7(d) in proceedings before the NRAB.[5]

Furthermore, Section 8 of the Norris-La Guardia Act, which is believed to prevent the United States from obtaining the requested injunction in the principal action, also stands in the way of intervenors' prayer for relief. Intervenors refused to bargain with respect to the Section 6 notices named in their complaint,[6] allegedly because of the presence of a reporter at negotiations, although they

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2 Memorandum in Support of Motion to Dismiss Complaint, Par. 3, pp. 8-16.

3 Ibid., p. 14, n. 17.

4 Ibid., p. 13.

5 Ibid., p. 14.

6 Complaint of Intervenors, pp. 2-3.

had not raised this objection in connection with previous negotiations. The uions' complaint skims over these facts, stating merely that "conferences" were "held" on said notices,[7] but these are facts of record on the pleadings,[8] and show conclusively that intervenors have not fulfilled the obligations imposed by Section 8 of the Norris-La Guardia Act as prerequisites to the bringing of an action for injunctive relief. A similar objection may be based upon the intervening unions' failure to make membership therein available to all FEC employees, which failure, as in a related case now pending before the Fifth Circuit,[9] should render the union shop agreements whose cancellation is complained of null, void and unenforceable as to the discriminating unions.

Therefore, the complaint of intervenors should be dismissed, and their motion to intervene denied.

273 2. Since the complaint of the United States herein should be dismissed for want of jurisdiction and for violation of Rule 17(a) of the Federal Rules of Civil Procedure, the subsidiary complaint of intervenors must also be dismissed, and the motion to intervene must be denied.

As shown in defendant's memorandum in support of motion to dismiss the principal complaint herein, Paragraphs 1 and 2, the principal complaint must be dismissed for want of jurisdiction and because the United States is not the true party in interest. But if this Court has no jurisdiction over the principal action, the entire action should be dismissed, for intervention will not serve as a means of conferring jurisdiction.[10] There can be no

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[7] *Ud.*

[8] Complaint of United States, pp. 2, 4.

[9] *B.R.T.* v. *Florida East Coast*, Court of Appeals No. 21,356; See Brief for Appellant, pp. 42-49.

[10] *Cochrane* v. *Potts*, 47 F. 2d 1027 (5th Cir. 1931); *Hill* v. *Wilson*, 219 F. 2d 200 (5th Cir. 1914).

intervention where the main action is dismissed, since the intervention depends upon the existence of a principal action and is subordinate thereto.[11]

There is every reason to apply the foregoing rules in the present case. Intervenors have presented a "skeleton" complaint containing only the barest outlines of a statement of facts and virtually no discussion of the injury allegedly suffered, or the rights allegedly violated by FEC. Intervenors' complaint was obviously intended to be dependent upon and supplementary to the principal complaint herein; standing alone it is subject to a motion for a more definite statement, or, in the alternative to a motion to dismiss for failure to state a claim upon which relief can be granted. Proper procedure dictates, therefore, that the complaint of intervenors be dismissed and their motion to intervene denied.

3. The motion to intervene herein is, in any event, fatally defective in that it does not show sufficient grounds either for intervention as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure or for permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

274 Rule 24(a) of the Federal Rules of Civil Procedure requires as a condition of intervention as of right that the intervenor show *both* that he will be bound by the court's decree *and* that the representation of his interest is presently inadequate. Since intervenors herein do not make the latter contention, and it is doubtful, in fact, whether they make the former, there can be no intervention as of right.

Treated, then, as a request for permissive intervention pursuant to Rule 24(b) the motion of intervenors alleges that common questions of law and fact underlie their complaint and the principal complaint herein. But this

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11 *Hofheimer* v. *McIntee*, 179 F. 2d 789 (7th Cir. 1950).

showing is insufficient to justify an exercise of discretion by the Court in favor of permitting intervention by the unions. Obviously such intervention would increase the number of parties (the unions are eleven in number!), greatly multiply issues of fact, make it necessary to cross-examine a much larger number of witnesses and delay the case. In order for the Court to permit such an intervention, which would appear to be to the prejudice of defendant's rights, it must be shown with far more detail that intervention is necessary in this case. Since this showing has not been made by the unions, and since it cannot, in all probability, be made, intervenors' complaint should be dismissed and their motion to intervene denied.

WHEREFORE, dependant respectfully prays that the complaint of intervenors be dismissed and the motion to intervene here be denied.

FLORIDA EAST COAST RAILWAY COMPANY

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Date: May 25, 1964

276 Filed May 27, 1964

Motion to Compel Answer

On Wednesday, May 20, pursuant to notice filed in this matter, the deposition of Eugene C. Thompson, called for examination by counsel for the defendant, was taken at Washington, D. C. In response to numerous questions the witness was instructed not to answer on the claim of administrative privilege. Defendant moves the Court for an Order requiring that deponent Eugene C. Thompson be required to answer the following questions:

1. "Q. And do mediators customarily make notes, during the course of their meetings with the parties, from which they prepare this report?

"A. Some do and some don't." (p. 8)

2. "Q. With those who do have you found that this interferes in any way with the course of negotiations?

"Mr. Shapiro: Objection. This deals with the proceedings and techniques by which the Board
277 conducts its mediations and, as to these matters, the practice is privileged, and I instruct the witness not to answer." (p. 8)

3. "Q. Now, do you recall, Mr. Thompson, that in this report that Mr. Newlin indicated that the company had requested that he proceed with his mediatory efforts, and that he had declined to do so?

"Mr. Shapiro: Objection. The contents of the mediators' reports to the Board are confidential. They relate to the manner in which the Mediation Board conducts its mediation functions.

"They are privileged and I instruct the witness not to answer." (p. 9)

4. "Q. Did Mr. Newlin report in this report, Mr. Thompson, any conversations between himself and officials of the Florida East Coast Railway Company?

"Mr. Shapiro: I object to the question on the ground that the contents of the mediator's report are privileged, and I instruct the witness not to answer." (p. 10)

5. "Q. Mr. Thompson, in the course of your experience with the Mediation Board, first as a mediator and then as Executive Secretary, isn't it true that reporters have sat in on mediations on various occasions?

"Mr. Shapiro: I object to the question on the ground that this deals with the practices and procedures of the Board, in conducting mediation, and I instruct
278 the witness not to answer.

"Mr. Devaney: Now, what is confidential, Mr. Shapiro, in connection with this? You have indicated that the others relate to procedures.

"I am asking him whether it ever occurred. It is a simple factual question. He can either say yes or no or he doesn't know.

"Mr. Shapiro: Well, it seems to me that the knowledge of the witness as to whether or not the Board has permitted the use of reporters or whether mediations in any given case have proceeded with the presence of reporters deal with what has transpired in other mediations.

"Now, what goes on in a mediation is completely privileged, Mr. Devaney." (pp. 10, 11)

6. "Q. Mr. Thompson, isn't it true that you have told officials of the Florida East Coast that mediation has proceeded in other cases in the presence of reporters?

"A. I don't recall any conversation with an official of the Florida East Coast Railway Company, Mr. Devaney.

"Q. To your knowledge, did not—if you did not have such a conversation were you informed by a member of the Board that such a conversation had taken place?

"Mr. Shapiro: Objection. This calls for a communication between the Executive Secretary and a member of the Board." (p. 12)

279 "Q. Now, was there any reason, Mr. Thompson, why these particular cases, including five cases docketed by your Board on or after January 1st of 1964, were assigned to a mediator whereas cases going back earlier in 1963, and the one in 1962, have not been assigned to a mediator?

"Mr. Shapiro: I object to the question on the ground that this deals with the reason why the Board assigns or does not assign mediators. It relates to its deliberations and is, therefore, privileged." (pp. 20, 21)

8. "Q. No, does your answer relate to a particular procedure for the Florida East Coast cases as distinguished from other cases?

"Mr. Shapiro: I think I am going to object to that question on the ground that it again relates to the manner in which the Board assigns cases for mediation.

"It concerns the deliberations of the Board. The witness has answered that he will not assign these cases except upon instructions of the Board.

"I am instructing him not to answer." (p. 22)

9. "Q. What action is contemplated or is normal for the Board to take when it is considering these cases?

"Mr. Shapiro: Objection. That goes to the Board's deliberative processes. It goes to the practice of the Board in conducting mediation.

"I instruct the witness not to answer." (pp. 27, 28)

280 "Q. Now, Mr. Thompson, following the recess of the mediation would not not be correct to assume that this means that Mr. Newlin's efforts had not succeeded in bringing about an agreement.

"Mr. Shapiro: I object to the question. It calls for a conclusion on the part of the witness concerning the Board's conclusions as to the matters that have been submitted to it." (p. 28)

11. "Q. You have stated earlier that these reports of the mediators come to you and that you see them and that you had seen Mr. Newlin's report.

"Now, did Mr. Newlin state in his report that he had not been able to bring about an agreement of the parties?

"Mr. Shapiro: Objection. The contents of the mediator's report are privileged and I instruct the witness not to answer." (p. 28)

12. "Q. Mr. Thompson, did Mr. Newlin indicate that he had not—that he had, rather, been able to bring about agreement of the parties?

"Mr. Shapiro: Objection. The contents of the mediator's report are privileged and I instruct the witness not to answer." pp. 28, 29)

13. "Q. Now, Mr. Thompson, what is the practice of the Board with respect to the time it holds a case without taking action on it?

281 "Mr. Shapiro: I am going to object to that question on the ground that it calls for a generalized

conclusion as to which Mr. Thompson is not qualified to make." (p. 29)

14. "Q. Isn't it true, Mr. Thompson, that the action of the Board with respect to Florida East Coast, in refusing and failing to take any or make any effort to assign mediators to complete its duties under the Act, are different than the practices customarily followed with respect to other requests for the services of the Board?

"Mr. Shapiro: Objection. It calls for a characterization of the mediation in the Florida East Coast case and a characterization of the mediation in other cases which relate to the practice of the Board in conducting mediation and is considered privileged." (p. 29)

15. "Q. Now, Mr. Thompson, as the attorneys for Florida East Coast we claim no privilege on the part of Florida East Coast to any of the questions that you have been previously asked.

"And I ask you again why has the Mediation Board refused, in the case of the Florida East Coast, to proceed with its duties under the Act to assign mediators and, once mediators are assigned, to proceed with mediation as the duties are imposed upon them by the Act?

"Mr. Shapiro: I object to the question on the ground that it relates to the Board's grounds and reasons and deliberations in conducting mediations.

"And I instruct the witness not to answer on the
282 ground that these matters are privileged." (p. 30)

16. "Q. Now, even though you don't recall whether this was said, Mr. Thompson, is there now a policy in the Mediation Board that it will not assign mediators in cases which involve litigation?

"Mr. Shapiro: I object to the question. It relates to the mediation practices of the Board and is regarded as privileged, and I instruct the witness not to answer." (p. 36)

17. "Q. Mr. Thompson, is it the policy of the Board, so far as you have been instructed or know, not to assign a mediator in a case in which you believe no results would be accomplished?

"Mr. Shapiro: Again I object to the question on the ground that it deals with the manner in which the Board assigns cases for mediation.

"I consider this matter to be privileged." (pp. 38, 39)

The foregoing information is relevant and material and essential to the defense of this action and the information requested is not subject to any proper or recognized claim of privilege.

WHEREFORE, defendant respectfully moves, pursuant to Rule 37(a) of the Federal Rules of Civil Procedure
283 for an Order requiring deponent to answer each of the foregoing questions.

Respectfully submitted,

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284 Filed May 27, 1964

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 64-107 Civ. J.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

FLORIDA EAST COAST RAILWAY COMPANY, *Defendant*.

Motion for Production of Documents

Pursuant to Rule 34 of the Federal Rules of Civil Procedure defendant, Florida East Coast Railway Company, moves the Court for an Order requiring plaintiff, The United States of America, to produce and to permit defendant to inspect and to copy the following documents:

1. All letters and correspondence from January 23, 1963, from the organizations listed in plaintiff's Exhibits A, B and C attached to the complaint or from the international unions with which the said organizations are affiliated or associated, or from other unions of the AFL-CIO to the Department of Justice of the United States, to the National Mediation Board or to any other department, office or agency of the United States relating to the strike against defendant, and/or issues discussed in the complaint filed herein by the United States of America, and all
285 correspondence from the Department of Justice of the United States, the National Mediation Board or from any other department, office or agency of the United States to the above-mentioned organizations relating to the strike.

2. All minutes, notes or other memoranda of conferences, either in person or by telephone, from January 23, 1963,

between the Department of Justice of the United States, the National Mediation Board and any other department, office or agency of the United States and the organizations named in Paragraph 1 above, relating to the strike against defendant or any issue discussed in the complaint filed herein;

3. Minutes of all Executive Meetings of the National Mediation Board from January 1, 1963 to date, dealing with Florida East Coast Railway Company;

4. All reports of mediators from January 1, 1963 to date, dealing with Florida East Coast Railway Company.

Plaintiff, the United States of America, has custody and control of the foregoing documents. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached.

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286 EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 64-107-Civ.J.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

FLORIDA EAST COAST RAILWAY COMPANY, *Defendant*.

STATE OF FLORIDA }
COUNTY OF DUVAL } ss.

R. W. WYCKOFF, Vice President and Director of Personnel of Florida East Coast Railway Company, being first duly sworn, says:

Plaintiff has the possession, custody or control of the documents listed in the Motion for Production of Documents herein.

All of said documents relate either to the labor dispute between defendant and the unions listed in plaintiff's
287 Exhibits A, B and C attached to the complaint herein, which dispute gave rise to and is the subject of the complaint, or to the relationship between plaintiff and the organizations listed in plaintiff's Exhibits A, B and C attached to the complaint herein, or to action by the plaintiff with respect to matters involved in this litigation. All of said documents are relevant to this case since their inspection is necessary to determine the legal merit of the position adopted by the labor unions in their dispute

with defendant, which position is also espoused by plaintiff in its complaint herein.

R. W. WYCKOFF
R. W. Wyckoff
Vice President and Director of Personnel
Florida East Coast Railway Company

SWORN TO AND SUBSCRIBED before me, a Notary Public, this 27th day of May, 1964.

BLANCHE B. REEVES
Notary Public, State of Florida at Large

My commission expires: May 7, 1968

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288 Filed May 27, 1964

Motion to Quash Subpoenas Duces Tecum

COME NOW, R. M. Cooke, General Chairman, Brotherhood of Railway Carmen of America; O. C. Jones, Vice President, The Order of Railroad Telegraphers; Frank Jackson, System Chairman, Dining Car Employees' Union, Local 351; R. L. Lanier, General Chairman, Sheet Metal Workers International Association; R. W. McDougall, General Chairman, International Association of Machinists; C. S. Kerr, District Chairman, The American Railway Supervisors Association, Lodge No. 591; C. J. Robbins, General Chairman, American Train Dispatchers Association; C. A. Dupont, General Chairman, International Brotherhood of Electrical Workers; I. S. Allen, Local Chairman, Brotherhood of Railway Carmen of America; R. G. Smith, Vice President, The Brotherhood of Railway Carmen of America; W. F. Howard, General Chairman, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; C. L. Winstead, General Chairman, Brotherhood of Maintenance of Way Employees; I. E. Hamilton, General Chairman, The

Order of Railroad Telegraphers; J. C. Ricard, The Order of Railroad Telegraphers, and J. E. Dubberly, The Brotherhood of Railway Signalmen, and any other non-operating union officials served with the same subpoena duces tecum as the one served upon the above named officials, and move the Court to quash these subpoenas duces tecum and for grounds would show:

289 1. The subpoenas duces tecum request no specific documents but rather are a printed form which if literally complied with would require the production at great expense of vast amounts of papers and correspondence, all of which have no relevancy or materiality to the issues in the pending cause. The subpoenas, by requesting merely broad categories of documents, amounting to virtually the entire files of the non-operating brotherhoods in Florida, are obviously a mere fishing expedition rather than the request for relevant and material evidence.

2. None of the matters which the defendants seeks to have produced are relevant or material to this cause.

3. This subpoena duces tecum on its face is for the purpose of harassment only and is impossible of compliance.

4. Pursuant to the Federal Rules of Civil Procedure the defendant must show due and good cause for the production of documents which the defendant has here failed to do.

Respectfully submitted,

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291 Filed September 24, 1964

Supplemental Memorandum for the United States

INTRODUCTION

This memorandum discusses the effect of the decision in *Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen, AFL-CIO,* C.A. 5 No. 21356, decided August 18, 1964, upon the instant proceeding.[1] It is the plaintiff's contention here that the Court of Appeals decision fully supports its claim for injunctive relief to vindicate the processes of the Railway Labor Act.

I. A SUMMARY OF THE ACTION

The complaint in this action is addressed to three departures from the requirements of the Railway Labor Act by defendant. Court I concerned a Uniform Working Agreement proposed by FEC on September 24, 1963, which comprehensively revised and superseded all previous
292 collective bargaining agreements for defendant's non-operating crafts or classes and the International Association of Railway Employees. These changes were placed into effect on October 30, 1963, notwithstanding the fact that the labor organizations had made a timely invocation of the services of the National Mediation Board and that the parties were therefore required to maintain the status quo under Section 6 of the Railway Labor Act, 45 U.S.C. 156.

Count II concerned defendant's proposal of July 31, 1963, to cancel the union shop agreements of 18 labor organizations. Notwithstanding the timely invocation of the services of the National Mediation Board by the labor

[1] For a fuller statement of the Government's contentions, the Court is respectfully referred to plaintiff's memorandum in support of its motion for preliminary injunction previously filed herein, and to the arguments in the transcript of proceedings before this Court May 26-28, 1964, particularly pages 27-59 and pages 572-597.

organizations involved, defendant has, since October 15, 1963, treated the union shop agreements as cancelled.

Count III was concerned with temporary working conditions announced on September 1, 1963, for all operating and non-operating employees of the carrier. The conditions were never the subject of procedures under the Railway Labor Act.

The United States prayed for an injunction against continuation of the allegedly illegal changes represented by the uniform working agreements of September 24, 1963, the union shop cancellation proposal of July 31, 1963, and the "conditions of employment" of September 1, 1963.

On May 26, 1964, Florida East Coast filed its answer. It admitted that it had put into effect its uniform working agreement of September 24, 1963, and the union shop cancellation proposed of July 31, 1963. It alleged however that its "conditions of employment" of September 1, 1963, were no longer in effect for any craft or class of its employees.

The matter came on for hearing on the plaintiff's motion for preliminary injunction before this Court on
293 May 26, 1964. The hearing continued until the afternoon of May 28, 1964.[2]

During the hearing it was established by the admissions of defendant's counsel (Tr. 55a-57) and by the testimony of R. W. Wycoff, defendant's Vice President and Director of Personnel (Tr. 77) that Florida East Coast is no longer operating under its temporary "conditions of employment" of September 1, 1963. Its operating personnel are presently said to be working under the collective bargaining agreements with the labor organizations representing them, as

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[2] In the discussion which follows the transcript of proceedings will be referred to as (Tr. ....; and the decision of the Court of Appeals in *Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen* will be referred to as (C.A. 5 dec.)).

amended by proposals of November 2, 1959, which the carrier has put into effect (Tr. 97, 98). Its non-operating personnel, are working under the Uniform Working Agreement of September 24, 1963 (Tr. 97, 154).

II. The Decision of the Court of Appeals.

The decision of the Court of Appeals makes clear several things:

First, a dispute of this kind is a major dispute subject to the procedures of Section 6 of the Railway Labor Act, 45 U.S.C. 156; not a minor dispute to be referred to the National Railway Adjustment Board (C.A. 5 dec., p. 10).

Second, the institution of wholesale changes of the sort here involved, in violation of the Railway Labor Act, are enjoinable pending exhaustion of the procedures of the Act (C.A. 5 dec., p. 12). The Norris-LaGuardia Act, 29 U.S.C. Section 101 et seq., is inapplicable and does not withdraw jurisdiction from this Court to enforce the mandate of the Act (C.A. 5 dec., p. 12, Fn. 23).

294 *Third,* the abrogation of the union shop agreement proposed on July 31, 1963, and implemented on October 30, 1963, without awaiting exhaustion of the procedures of the Act is illegal and enjoinable. This Court's ruling to this effect in *Brotherhood of Railroad Trainmen* v. *Florida East Coast Railway Company,* No. 64-40-Civ-J, decided March 2, 1964, was fully affirmed (C.A. 5 dec., p. 19). The Court of Appeals also held that this Court was correct in its ruling that the uniform working agreement for operating employees, proposed on September 25, 1963, could not be put into effect until the procedures of the Act were exhausted (C.A. 5 dec., p. 19). *A fortiori,* the uniform working agreement of September 24, 1963, for non-operating employees has also been illegally put into effect and should similarly be enjoined pending exhaustion of the processes of the Act.

Fourth, whether the labor organizations are on strike or not is irrelevant to their status as the bargaining representative for all employees in the crafts or classes covered by their agreements, even if these employees are not union members; and their collective bargaining agreements remain in full force and effect. The argument that the agreements are suspended during the period of a strike "has no merit." (C.A. 5 dec., p. 14).

Fifth, the carrier has the right to hire new employees and to operate during a strike. But it must do this in accordance with the terms of the existing collective bargaining agreements except to the extent that departures from those agreements are reasonably necessary "to make a meaningful reality of FEC's right to continue to operate . . ." (C.A. 5 dec., p. 18). In an action in which the legality of such departures are challenged under the Railway Labor Act, such as this case and *Brotherhood of Railroad Trainmen* v. *Florida East Coast Railway Company, supra,* the District Court must be convinced as to the necessity of what the carrier has done or proposes to do (C.A. 5 dec., p. 18).

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Each particular departure from the lawful agreements must be fully justified by the carrier as being "reasonably necessary". And the "reasonable necessity" to which the Court of Appeals refers is not to be measured by mechanical factors such as comparative levels of pre-strike and post-strike operations, or by financial considerations. No single factor is controlling. Rather, the Court must look to the totality of circumstances surrounding the particular departure from the collective bargaining agreement which the carrier alleges to be necessary, and to relate them to the carrier's right to continue to operate. Thus, the efforts by the carrier to comply with its collective bargaining agreements, the time it has had to restore operations, its good faith in departing from the agreement, the possibilities for recruitment of replacements, in

short, the entire history of the dispute, are to be considered. The carrier has a right to continue to operate, but that right cannot be exploited as an occasion for wholesale escape from collective bargaining agreements which are lawfully in effect. If a carrier creates difficulties for itself by such attempts, it cannot contend that the situation created by its own refusal to comply with the agreements constitutes "reasonable necessity" for departure from them.[3]

296 III. The Effect of the Court of Appeals' Decision Upon This Case.

A. *The Uniform Working Agreement and the Union Shop Abrogation.*

The record in this case establishes that the United States is entitled to an immediate injunction. The union shop abrogation of July 31, 1963, and the Uniform Working Agreement of September 24, 1963, both implemented by the carrier despite timely invocation of the services of the National Mediation Board, are violations of 45 U.S.C. 156 as construed by the Court of Appeals and should be enjoined forthwith, pending completion of the mediation process. That process can begin when the statutory condition of stability intended by 45 U.S.C. 156 is restored.

B. *The Conditions of Employment.*

An injunction must also issue to prevent reversion by the carrier to its Conditions of Employment or any other

[3] The foregoing discussion is based upon plaintiff's recognition that the decision of the Court of Appeals constitutes a controlling precedent in this Court. It is the Government's position, however, that this Court's original decision in *Brotherhood of Railroad Trainmen* v. *Florida East Coast Railway Company*, was correct in holding that a carrier is not permitted to deviate from the terms of its collective bargaining agreements in any significant respect during the period of a strike, except as expressly authorized by the Railway Labor Act. The Act does not provide for the exception recognized by the Coutr of Appeals. The Government adheres to this position in this case.

wholesale departure from the terms of its collective bargaining agreement. Mr. Wycoff testified that in the event the Uniform Working Agreement were to be enjoined, the carrier would revert to the Conditions of Employment of September 1, 1963 (Tr. 165, 167). Since these conditions are substantially similar to the Uniform Working Agreement (Tr. 144, 156-162), the carrier would, in effect, continue to operate as before, and thus frustrate this Court's decree. Such wholesale departures from the terms of the collective bargaining agreements lawfully in force are expressly condemned in the Court of Appeals' decision. Only if the Court is convinced that a *particular* departure is reasonably necessary to the exercise of the carrier's right of self-help may it be authorized. Thus, the threatened wholesale reversion must also be enjoined.

C. *Particular Departures from the Collective Bargaining Agreements.*

The remaining question to be discussed is whether any particular departures from the collective bargaining
297 agreements are reasonably necessary at the present time, in the light of the facts and circumstances of this case. Plaintiff submits: (1) the record as it stands shows that the carrier cannot justify any departures from the agreements; (2) no further hearing is necessary for the consideration of proposed departures; but (3) if the court is convinced that a further hearing is necessary, that it should issue a preliminary injunction requiring the carrier to adhere to the lawful agreements until the Court has authorized particular departures sought by the carrier. The remainder of this discussion will be addressed to the first proposition.

A review of the testimony of Mr. Wycoff (Tr. 76-250) and of Mr. Winfred L. Thornton, President of the Florida East Coast Railway Company (Tr. 256-295), clearly establishes that there is at present no necessity for a departure

from the collective bargaining agreements lawfully in force.. In sum, the evidence establishes that the carrier never made a genuine effort to comply with the collective bargaining agreements. The strike has been on for over twenty-one months. But for its own conduct FEC could by now have substantially complied with the agreements while still exercising its right to operate. Its wholesale revisions of job classifications, wages, work day, hours, seniority, safety, discipline, vacations were the product of a program to rid itself of agreed conditions which it considered onerous,[4] rather than a product of the emergency.

When the strike began, FEC thought so little of its own counter-proposals to the non-operating unions that it never implemented them (Tr. 190), although it acquired this right of self-help when the processes of the Act were
298 exhausted. *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio RR. Co.*, 372 U.S. 284. Instead, it immediately embarked on a new long range personnel program. On September 1, 1963, the carrier codified the most important part of that program—rates of pay, rules and working conditions—into its "Conditions of Employment". Each of its employees were required to accept these conditions as their exclusive individual working agreement, notwithstanding the fact that the collective bargaining agreements for their crafts or classes were still in effect and were still unmodified (Tr. 102-114; Pl. Exh. 4A).

The carrier's long range personnel program was described in detail in the testimony of Mr. Thornton in the hearing before the Joint Federal Inquiry Board under the chairmanship of the Department of Labor with the Department of Defense and National Aeronautics and Space Agency participating, dated October 1, 1963 (Tr. 233, 237). By that time the program had been developing

[4] The carrier's right to do this is not questioned, of course, so long as it is done in accordance with the requirements of the Railway Labor Act.

for ten months. Even though the former collective bargaining agreements were still in effect and had not been modified under the Act, Mr. Thornton was able to testify that the carrier was operating with almost full manpower requirements (Tr. 276). It is also significant that three weeks after the Conditions of Employment were codified it proposed its Uniform Working Agreements for both operating and non-operating personnel. These were simply the Conditions of Employment with a preamble and certain minor additions (Tr. 144, 156-162, 241).

The long range program and the history of the Conditions of Employment, plus Mr. Thornton's testimony show that the carriers real objective was to profit from the strike situation by shaking itself free of the collective bargaining agreements with which it was dissatisfied. They show also that it never really made any effort to
299 comply with those agreements while they were legally in force. It had no difficulty in recruiting personnel (Tr. 242-243); and within ten months it was able to recruit and train a workforce in excess of 650 employees which was able to handle 95% of the freight volume handled before the strike (Tr. 230, 234). In the period since October 1963, there is no reason why, if it had so desired, it could not have expanded its work force at the same rate. Only its illegal implementation of its Uniform Working Agreement explains its failure to do so.

The carrier's refusal to make any genuine effort to comply with the agreements is further demonstrated by the carriers complete lack of candor with respect to the changes in its operating agreements. On November 4, 1963, it purported to put into effect a Uniform Working Agreement for its operating personnel. Many of the provisions in this agreement were concerned with the same subject matter as the carriers notice of November 2, 1959. Under Public Law 88-108 it was prohibited from changing the rates of pay, rules and working conditions which had

been the subject of the November 1959 notice. In an action by the United States to compel compliance with the provisions of Public Law 88-108 (*United States* v. *Florida East Coast Railway Company*, D.C.M.D. Fla., No. 63-260-Civ-J), this Court directed the carriers to comply with the provisions of the statute by withdrawing its changes. In fact, however, the carrier continued to operate under its "Conditions of Employment", which were substantially the same as the uniform working agreement which had been enjoined (Tr. 126, 127). It is plain from the testimony of Mr. Wycoff that the carrier made no effort to comply with the collective bargaining agreements in force, but simply carried on as before under the Conditions of Employment which were substantially the same as the enjoined provisions of the working agreement. (Tr. 104, 128, 206).

300 It is also significant that although the carrier insisted that its Conditions of Employment were the result of the emergency created by the strike, nowhere in the conditions or in the document which the carrier required all employees to sign acknowledging submission to the "Conditions of Employment" (Pl. Exh. 4A), was there any reference to an emergency or any indication that the conditions were temporary. (Tr. 125-126).

Note must also be taken of the carrier's desperate maneouvering after this Court's decision in *Brotherhood of Railroad Trainmen* v. *Florida East Coast Railway Company*, as reflected in plaintiff's exhibits numbers 5, 6 and 7. These exhibits and Mr. Wycoff's testimony (Tr. 128-141) further reflect the carrier's tortured and often confusing efforts to escape the requirements of the collective bargaining agreements which were unsatisfactory to it.

This carrier has had more than enough time to build a staff which can operate its own equipment, to the extent it wishes to operate, in accordance with the terms of the collective bargaining agreement legally in force. More than 21 months have expired since the beginning of the

strike. The carrier's attempts to impose its presently illegal Uniform Working Agreement, and to mask its "Conditions of Employment" behind its fictional assertion that the permanent agreements are "in effect" (Wycoff *passim*) and the long range program it implemented as soon as it started to operate (Tr. 266), are the basic cause of any difficulties it may now face from any shortage of trained personnel. It claims to be operating near full freight capacity (Tr. 230, 232), and to have a permanent personnel program (Tr. 234). It does not at present face an operating emergency (Tr. 143), but rather, is handling all of the freight traffic that is presented to it. (Tr. 272). And the carrier's own officers have testified that compliance with the agreements would still permit operations at around 50% of pre-strike capacity (Tr. 216, 264). "Reasonable necessity" certainly does not constitute a guarantee of return to pre-strike conditions. In view of this carrier's conduct and the peculiar history of the labor disputes on its property since January 1963, even if some reduction in service might temporarily result from compliance with the law, this is plainly not the kind of situation which would be "reasonably necessary" grounds for departure from the existing agreements within the meaning of the Court of Appeals decision.

301

Conclusion

Under the Court of Appeals decision the implementations of the uniform working agreement of September 24, 1963, and the union shop abrogation proposal of July 31, 1963, are plainly illegal and should be enjoined forthwith. The carrier should also be enjoined from reverting in any respect to the conditions of employment of September 1, 1963, or any other conditions departing from the collective bargaining agreements. A decree should issue requiring it to comply with the terms of its existing collective bargaining agreements unless and until these agreements are

changed in accordance with the procedures of the Railway Labor Act.

Respectfully submitted,

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September 1964

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302 Filed September 24, 1964

Memorandum of Defendant, Florida East Coast Railway Co.

This memorandum is submitted pursuant to the request of the Court as contained in the letter of September 1, 1964, from John W. Douglas, Assistant Attorney General, Civil Division, by Harland F. Leathers, Chief, General Litigation Section. It is our understanding of the request, that the Court desires from each party a memorandum setting forth its views of the effect of the decision of the United States Court of Appeals for the Fifth Circuit, in *Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen,* on this case and, we assume, our

respective suggestions as to further proceedings in this case.

I. Introduction

The decision of the United States Court of Appeals for the Fifth Circuit on August 18, 1964, in *Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen,* No. 21356, affirmed in part and reversed and remanded in part the injunction issued by the United States District Court in *Brotherhood of Railroad Trainmen* v. *Florida East Coast Railway Company,* No. 64-40-Civ. J. Without attempting to set forth a detailed resume of that decision, with which the Court and the parties are already familiar, it will be helpful to note the basic points which we deem to be controlling here.

303 1. That the dispute was a major dispute.[1]

2. That in the absence of strike conditions, institution of "wholesale changes of the sort here involved would be enjoinable by the District Court pending exhaustion of the procedures of the Act,"[2] and even in the presence of strike conditions, which gave Florida East Coast[3] the unquestioned right to resort to self-help,[4] FEC may not engage in wholesale abrogation of the agreement.[5]

3. That the Brotherhood of Railroad Trainmen[6] is still the bargaining representative of all the employees in the crafts of trainmen and yardmen, whether union members or not, and the employees of FEC are entitled to the benefit of the terms of the (BRT) agreement, which may not be

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[1] Slip opinion, p. 10.

[2] Hereinafter, also referred to as FEC.

[3] Slip opinion, p. 12.

[4] Slip opinion, pp. 14-15, 17.

[5] Slip opinion, p. 17.

[6] Hereinafter, also referred to as BRT.

superseded by individual contracts, whether consented to by the employees or not.[7]

4. That FEC may not institute the changes in rates of pay, rules and working conditions contained in its Section 6 notices of July 31 and September 25, 1963, until the statutory procedures are exhausted.[8]

5. That there is an actual strike against FEC by the non-operating unions, the continuation of which is legal, as is the effort of FEC to operate.[9]

6. That it is not a violation of the (BRT) agreement or the Railway Labor Act, for FEC to hire and pay non-union replacements, and at the conclusion of the strike such replacements need not be discharged or displaced to make way for returning strikers.[10]

7. That FEC has no obligation to fire any replacement, at least, until union membership has been declined by him.[11]

8. That the FEC's right of self-help means help which is reasonably needed to meet the impasse of a railroad desiring to run and unions unwilling to furnish workers.[12]

9. That the November 2, 1959, notice was not superseded by the September 25, 1963, notice and FEC is free to operate under the 1949 collective bargaining agreement as amended by the November 2, 1959, notice.[13]

304 10. That FEC may, in addition, institute and maintain such employment practices, etc. as are, and

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[7] Slip opinion, p. 14.

[8] Slip opinion, p. 19.

[9] Slip opinion, p. 14.

[10] Slip opinion, pp. 16-17.

[11] Slip opinion, p. 17.

[12] Slip opinion, p. 17.

[13] Slip opinion, pp. 18-19.

continue to be, reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions.[14]

II. Florida East Coast Renews Its Prior Motion to Dismiss the Complaint of the United States and of Intervenors.

The grounds urged in support of FEC's motion to dismiss are incorporated herein by reference and need not be repeated.

The decision of the Circuit Court of Appeals in the *Trainmen* case further supports FEC's prior contentions to the effect that the United States lacks standing to bring this action, that there is no "case or controversy" existing between the United States and FEC, and that the United States is not the real party in interest. As the Court has recognized, the dismissal of the complaint of the United States will also require the dismissal of the complaint of the intervenors (Tr. 60).

The decision of the Court of Appeals makes it plain that, while FEC may not place into effect the changes proposed in its July 31, 1963, or September 24, 1963, Section 6 notices until the procedures of the Act have been completed, FEC is free to institute and maintain such employment practices as are reasonably necessary to the effecuation of its right to operate its railroad under strike conditions. Consequently, this decision of the Court of Appeals destroys entirely the primary basis asserted by the United States for its standing to sue. Thus, the theory of the United States was that FEC's operation under strike imposed conditions was illegal because FEC had not complied with the requirements of the Railway Labor Act to change existing agreements and by these illegal acts caused a continuing strike which carries with it disruption to interstate commerce and the United States thereby

[14] Slip opinion, pp. 19-20.

claimed the right to prevent activity which imperils its free flow of commerce.[15] But the Court of Appeals held that there was an actual strike by the non-operating unions in support of their wage demand after all procedures of the Act had been exhausted;[16] that FEC had the unquestioned right to resort to self-help; and that self-help means the right to institute and maintain such employment conditions as are reasonably necessary to
305 permit it to operate under strike conditions. As previously pointed out, and as emphasized by the decision of the Court of Appeals, there is no basis in fact for the contention that there is any interruption to commerce or that any interruption to commerce can be reasonably anticipated so as to give the United States standing to maintain this action. Nor is there any basis to sustain the assertion of standing on the theory that the United States seeks to protect the jurisdiction of the National Mediation Board. In the first place, plaintiff (United States) contended that, "The evils which would flow from permitting resort to 'temporary' conditions during a strike . . ."[17] requires that the United States protect the jurisdiction of the Mediation Board in order to prevent the institution of changes in conditions of employment during the strike period.[18] This argument is, of course, entirely overturned by the decision of the Court of Appeals that FEC is free to:

> ". . . institute and maintain such employment practices, etc., as are, and continue to be, reasonably necessary to effectuate its right to run the railroad under the strike conditions."[19]

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[15] Memorandum in Support of Motion of the United States for Preliminary Injunction (Hereinafter referred to as Memorandum) pp. 20-22.

[16] Slip opinion, p. 4.

[17] Memorandum, p. 17.

[18] Complaint pp. 6-10, Memorandum pp. 16-20.

[19] Slip opinion, pp. 19, 20.

Moreover, the argument stressing the urgent need felt by the government to protect the Railway Labor Act from wholesale violation is also shown to be a fiction.

In the second place, as the record shows, FEC has never refused to comply with the mediatory processes of the Railway Labor Act. To the contrary, FEC has, for example, repeatedly stated its willingness to mediate its notices of July 31 and September 24, 1963, notwithstanding the fact that it was the Carrier's position that these rules changes had been properly placed into effect. As the record also demonstrates, it was the Mediation Board, not FEC, who failed to fulfill its duty under the Act by failing and refusing to mediate; by failing and refusing to assign mediators; by discriminating in the assigning of mediators whereby it assigned mediators in some cases recently docketed and failed and refused to assign mediators in cases docketed many months earlier. (Tr. 306, 307, 339, 356-358, 495, 496, 497, 498, 499, Def. Exh. T (for identification).

306 III. If Complaints of Plaintiff and Intervenors Are Not Dismissed, the Court May Dispose of the Case by Order and Without Further Hearing

The Complaint of the United States prays for the following permanent injunctive relief: FEC is to be restrained from

(1) In any manner continuing in effect of implementing the changes contained in its July 31 and September 24 notices except by agreement with the Unions or until the National Mediation Board acts upon said notices;[20]

(2) making any other changes except in accordance with Section 6 of the Act;[21]

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[20] Complaint, p. 10, item 1 (a).

[21] Id., item 1 (b).

(3) continuing in effect or taking any action under the "Conditions of Employment" except by agreement with the Unions;[22]

(4) making any other changes affecting its employes as a class except in accordance with Section 6 of the Act.[23]

(5) making individual agreements with employees except in accordance with the collective bargaining agreement for that class of employees.[24]

(6) to revoke all notices and actions placing into effect the changes proposed in the July 31, 1963, and September 24, 1964, notices and in the "Conditions of Employment";[25]

(7) to bargain in good faith with the Unions.[26]

Defendant, FEC, raised various defenses, most of which have been decided by the Court of Appeals, as will be discussed hereinafter. The major questions raised by Defendant and left undecided are:

(a) Refusal of Unions to bargain;

(b) Refusal of National Mediation Board to carry out its duty under the Act, including prompt assignment of mediators; performance of its mediatory services; and prompt release of disputes when mediatory efforts have failed;

(c) Discrimination by Unions against replacements which has rendered Union Shop Agreement void and unenforceable as to such employees.

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[22] Ibid., p. 11, item 2 (a).

[23] Id., item 2 (b).

[24] Id., item 2 (c).

[25] Id., item 3 (a).

[26] Id., item 3 (b).

307 Each of plaintiff's prayers for relief has already been decided by the Court of Appeals in the *Trainmen* case; consequently, there is no need for further hearing. Both the relief prayed for by Plaintiff and the defenses raised by Defendant can, and we submit should, be disposed of by ex parte orders. Thus, item (1) relates to the July 31 and September 24, 1963, notices. The Court of Appeals has rendered FEC's action in placing the rules changes contained in these notices into legal effect as amendments to prior agreements a nullity. Actually no further order is required to achieve the nullification of these actions since they are legal nullities by virtue of the decision of the Court of Appeals. Moreover, FEC is prepared to so notify the Unions that its notices placing these rules into effect are withdrawn. While an order is not required, FEC does not object to such an order if the Court deems it is necessary.

The second part of item (1) relates to the completion of the statutory procedures before placing the rules changes contained therein into effect. Item (7) and Defendant's points (A) and (B) must be considered together. The Court of Appeals has already decided that FEC may not place into effect its July 31 or September 25 (September 24 to non-ops) Section 6 notices into effect until the procedures of the Act have been completed. With this FEC has not the slightest quarrel and and is fully prepared with or without further order in this case to comply fully with the spirit and intent of the Circuit Court's decision. However, the record in this case shows beyond any doubt a blatant violation of obligation—not by FEC—but rather by the Unions in flatly refusing to bargain and by the Mediation Board in failing and refusing to perform its statutory duties. The United States has loudly proclaimed that good faith bargaining is not required, a position which was adopted by the intervenors. The Court of Appeals has, in effect, held that good faith is not required to justify

a refusal to bargain, provided only that the services of the Mediation Board are requested within 10 days.

Counsel for the United States has made two very significant admissions. First, he left no doubt that the Mediation Board has not carried out its mediatory duties. He states,

308 "Now, the fact of the matter is and the record will show that, as to the particular rules changes we are involved with here, the Mediation Board has not sent a Mediator. (See, Def's Exh. T for identification) That's plain; we don't deny it." (Tr. 339)

Second he states:

"If the injunction is granted, the Court may very well condition it on some requirement that the Mediation Board promptly undertake mediation. I think that's within your equitable discretion and I dare say the Board would be more than willing to try once the statutory condition, the statutory atmosphere, is restored." (Tr. 326)

We believe the proper solution to this problem is simply to provide by order that FEC be enjoined from placing such rules into effect until the procedures of the Act are completed and that the National Mediation Board is directed to promptly undertake mediation in all docketed FEC cases and if such efforts of the Board to bring about an amicable settlement through mediation should be unsuccessful, the Board is directed at once to endeavor to induce the parties to submit their controversy to arbitration and if arbitration is refused by one or both parties, the Board shall at once notify the parties in writing that its mediatory efforts have failed and for 30 days thereafter, unless in this intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of the Act, no change will be made in the rates

of pay, rules or working condition or established practices in effect prior to the time the dispute arose.

As the Court will note, the portion directed against the National Mediation Board is largely a direct quote from the statute and the entire provision is wholly in accord with the provisions of Section 5, First of the Act. Why then, is it necessary to restate this duty? Simply because the Mediation Board has failed to fulfill its statutory duty and it is, in effect, the party plaintiff or perhaps more technically correct this action is brought on behalf of and for the benefit of the Mediation Board. Plaintiff has already stated that it has no objection to such an order and this would avoid any necessity of having to resolve other difficult questions. It is also fully in keeping with the statutory obligation as to FEC and the Unions, and fully in accord with the decision of the Court of Appeals.

309 Items (2), (3), (4) and (5) have been disposed of by the decision of the Court of Appeals. As has already been pointed out, the Court held that FEC is required to operate under the 1949 BRT agreement as amended by the November 2, 1959, notice, except that it may institute and maintain such employment practices, etc., as are reasonably necessary to effectuate its right to continue to run its railroad under strike conditions. We believe this is fully applicable here and the Court may so order.

Although we recognize that the Court of Appeals has stated that it falls to the lot of the District Judge to pass on what changes are in fact necessary in order for FEC to continue to operate,[27] we do not believe such a hearing would be appropriate at this time. FEC will immediately undertake to conform its operations so as to comply with each agreement except to the extent employment conditions,

[27] Slip opinion, p. 18, 20.

etc., differing therefrom are necessary to permit the continued operation of the carrier under strike conditions. 17 organizations are covered by the Complaint,[28] and there are at least 13 individual collective bargaining agreements involved, together with many thousands of interpretations by the Adjustment Board (about 40,000) as well as numerous interpretations by various national disputes councils, etc. To bring its operations into compliance with these various agreements, as interpreted and applied to the extent possible under strike conditions will present a very considerable problem. Certainly, the obligation to comply with the order of the Court in this regard is the Carrier's. We do not delude ourselves that the Unions will agree on all, or any, deviations that are reasonably necessary to permit Defendant to continue to operate under strike conditions, but the only orderly way to proceed, we submit, is for the Carrier to bring its operations into compliance with the Court's order and then if there are disputes it will be soon enough for the Court to decide them as directed by the decision of the Court of Appeals. For the Court to attempt to decide these questions in advance would be an unwarranted burden on the Court and might prove to be an exercise in futility. To comply with such order,
310 will require a reasonable period of time—there are some things that can be done quickly and Defendant proposes to do them quickly; but to represent that Defendant could fully conform all operations to prior agreements, except to the extent that employment conditions differing therefrom are reasonably necessary to permit the continued operation of the railroad under strike conditions, immediately upon issuance of an order would be totally unrealistic. Neither operations under strike conditions nor strike conditions themselves are static. For example, the Brotherhood of Locomotive Engineers formally went on strike on or about the 16th of September; the recent hurri-

[28] United Transport Service Employees (Red Caps and Porters) has been listed twice.

canes presented special problems affecting operations under strike conditions; the highly seasonal nature of Defendant's traffic also cause different problems of operating under strike conditions at different times of the year; and various acts of sabotage and harassment have presented other operating problems under strike conditions. Nevertheless, a reasonable time as to any particular matter is a standard which the Court can effectively enforce.

As to item (6), this likewise has been disposed of by the decision of the Court of Appeals and is covered by our comments with respect to items (2), (3), (4) and (5). Suffice to say, the Conditions of Employment are not now in effect and the order, as discussed above will fully cover this matter.

The final question is Point C, Discrimination by the Unions which has rendered their Union Shop Agreements null and void and unenforceable. This question was not decided by the Court of Appeals but was disposed of by the Court imposing the limitation that FEC shall not be required to discharge any replacement under the Union Shop Agreement, at least, until the employee has been offered membership and has declined to join. We submit that this is the most practical solution to the problem, and, without having to decide whether, as we believe very clearly is the case, discrimination renders such Union Shop Agreements void and unforceable, discrimination is avoided, a direct violation of the statute is avoided, and the Unions are, in reality, required to do only what the statute requires.

311 SUMMARY

Defendant respectfully submits that the Complaints herein should be dismissed. In the event the Complaints are not dismissed, defendant further respectfully submits that this case should be disposed by order without further hearings at this time. Defendant's views as to the lan-

guage of such order are reflected in the proposed order attached hereto.

Respectfully submitted,

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24 September 1964

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312 INJUNCTION

This matter came on to be heard on the 26, 27 and 28 of May, 1964, on the Complaint of the United States of America, the exhibits attached thereto, the motion of the plaintiff for a preliminary injunction, and each of the parties being represented by counsel and the Court having received testimony and documentary evidence, and having considered memoranda and briefs of counsel and having heard argument of counsel, it is

ORDERED, ADJUDGED AND DECREED:

1. That the defendant, Florida East Coast Railway Company (hereinafter also referred to as "defendant" or "FEC"), its officers, agents, servants, employees and attorneys and all persons in active concert or participating with them are restrained and enjoined from instituting

change in rates of pay, rules and working conditions contained in its July 31, 1963, and September 24, 1963, Section 6 notices until the statutory procedures are exhausted.

2. That the National Mediation Board shall promptly undertake mediation in all docketed FEC cases, both the Carrier's and the Organiaztions, and if such efforts of the Board to bring about an amicable settlement through mediation should be unsuccessful, the Board shall at once endeavor to induce the parties to submit their controversy to arbitration and if arbitration is refused by one or both parties, the Board shall at once notify the parties in writing that its mediatory efforts have failed and for 30 days thereafter, unless in this intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of the Act, no change will be made in the rates of pay, rules or working conditions or established practices in effect prior to the time dispute arose.

3. That the defendant shall operate under the collective bargaining agreements in effect with the various organizations listed in Exhibits A, B and C to the Complaint, except that defendant may establish and maintain such employment practices, etc., as are, and continue to be reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions, and defendant shall immediately take appropriate steps to bring its operations into compliance with this order and shall proceed with such compliance in a reasonable manner.

313 4. That the defendant has no obligation to fire any replacement under any Union Shop Agreement, at least, until union membership has hereafter been offered without discrimination or reservation and declined by the replacement.

5. That the defendant was, and is, free to hire and pay non-union replacements and upon termination of the strike,

defendant need not discharge or displace such replacements in order to make way for returning strikers.

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Bryan Simpson
Chief Judge
U. S. District Court

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314 Filed Oct. 5, 1964

Intervenors' Proposed Findings of Fact and Conclusions of Law

This cause having been heard by the Court on the motion of the plaintiff, the United States of America, for a preliminary injunction, the complaints of the United States of America and the intervenors, and the answer of defendant, and the Court having received testimony and other evidence in open court and heard argument from counsel for all parties, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

(1) The defendant, Florida East Coast Railway Company (FEC), is a corporation organized under the laws of the State of Florida and engaged in interstate commerce as a railroad "Carrier" as defined in Section 1 of the Railway Labor Act (45 U.S.C. 151) (hereafter, the Act). It is subject to the provisions of said Act, and is classified by the Interstate Commerce Commission as a class 1 railroad. Defendant is licensed to do business and does
315 business within the Middle Judicial District of Florida, and has its principal place of business in St. Augustine, Florida.

(2) Collective bargaining agreements between defendant and the labor organizations listed in footnotes 1, 2, and 3, *infra,* have been in effect for many years governing rates

of pay, rules and working conditions of certain crafts or classes of defendant's employees. Said collective bargaining agreements, with subsequent changes agreed to by the relevant parties, have been in effect at all times material to this suit.

(3) Since January 23, 1963, the 11 labor organizations listed in footnote 1,[1] representing certain crafts or classes of FEC's non-operating employees, have been legally on strike against FEC. This dispute began on September 1, 1961, with the service of notices by the 11 organizations under Section 6 of the Act (45 U.S.C. 156) seeking a wage increase of 25 cents per hour and six months advance notice of any intended layoff or abolition of positions. FEC's counter-proposals, served on September 18, 1961, called for wage reductions of at least 20% for some 39 groups of middle and lower-range employees in 6 craft groupings; for the establishment of new entry rates for 7 groups of employees in 2 crafts at 80% of existing
316 levels, with certain periodic increases; for the establishment of a flat $1.25 hourly rate for dining car waiters and other employees serving food and drinks; and for the elimination of all rules or provisions requiring more than 24 hours advance notice prior to abolition of positions or reduction of forces. This September 18, 1961, notice constitutes the outer limits of FEC's proposals during the dispute. The FEC, however, has never attempted or proposed to implement its September 18, 1961, counter-proposals or to change existing agreements as so proposed.

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[1] Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway Carmen of America; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Hotel & Restaurant Employees & Bartenders' International Union; International Association of Machinists; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; Order of Railroad Telegraphers; Sheet Metal Workers' International Association.

(4) The immediate precipitating cause of the strike was FEC's announcement on January 16, 1963 (nearly three months after the National Mediation Board had advised, on October 22, 1962, that it was terminating its services as contemplated by the Act), that all non-operating jobs would be abolished as of January 23, 1963. For a brief period after the strike began the railroad was completely shut down. On February 3, 1963, the defendant resumed freight operations, using supervisory personnel and replacements for those employees who were not reporting for work.

(5) These replacements in both the operating and non-operating crafts made individual agreements with FEC concerning their rates of pay, rules and working conditions, on terms substantially different from the collective bargaining agreements in force for the relevant crafts or classes.

(6) On September 1, 1963, FEC, without filing any notice under Section 6 of the Act and without negotiation with the relevant labor organizations, unilaterally replaced the individual agreements under which the replacements
317 were working with a uniform set of rates of pay, rules and working conditions, also substantially different from the existing collective bargaining agreements. Each employee reporting for work thereafter was required to waive his rights under the existing collective bargaining agreement for his craft or class, and to agree individually by a signed receipt to accept instead FEC's new "Conditions of Employment," as they were called.

(7) By August, 1963, the defendant was performing 90.06% of the carload freight service performed in a comparable period the preceding year; by September, 1963, the figure was 95.53%; and currently the railroad is carrying carload freight at a volume equal to or in excess of seasonally comparable pre-strike levels, and is handling all the freight traffic that is presented to it.

(8) By October 1, 1963, the defendant was operating at this near-capacity level with about 650 employees, as op-

posed to the approximately 2000 employees it had in comparable pre-strike periods. Its vice-president in charge of operations stated on October 1, 1963, that by that time the carrier had achieved nearly the full manpower levels required to maintain stable operations under the rates of pay, rules, and working conditions then actually in effect.

(9) On September 24, 1963, FEC served a notice pursuant to Section 6 of the Act upon the 17 non-operating organizations listed in footnote 2,[2] in which it pro-
318 posed a new "Uniform Working Agreement," substantially the same as the September 1 Conditions of Employment and constituting a comprehensive revision of the rates of pay, rules and working conditions contained in the governing collective bargaining agreements with the 17 organizations.

(10) After a meeting between representatives of the organizations and FEC on October 18, 1963, to discuss the notice was terminated because the parties could not agree whether to confer in the presence of a court reporter, the services of the National Mediation Board were requested by the 17 organizations on October 23, 1963, in a letter with attachments which was received by the Board on October 28, 1963. The Mediation Board assumed jurisdiction, and on October 31, 1963, docketed the dispute as Case No. A-7055.

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[2] American Railway Supervisors Association, Inc.; American Train Dispatchers Association; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway Carmen of America; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Dining Car Employes Union; International Association of Machinists; International Association of Railway Employees; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers; Order of Railroad Telegraphers; Railroad Yardmasters of America; Sheet Metal Workers' International Association; United Transport Service Employes (Red Caps); and United Transport Service Employes (Train Porters).

(11) One of the 17 organizations, the International Association of Railway Employees (IARE), resumed negotiations on October 22, 1963, and requested that it not be included in Case No. A-7055. These negotiations terminated on December 18, 1963, and the IARE invoked the Board's services on December 26, 1963. On January 6, 1964, the Board docketed the dispute as Case No. A-7093.

(12) Cases No. A-7055 and A-7093 are still pending before the National Mediation Board.

(13) Nevertheless, on October 30, 1963, FEC unilaterally put into effect the new Uniform Working Agreement contained in its notice of September 24, 1963. The non-operating employees of the carrier have been since that time and are at present actually working under the rates of
319 pay, rules, and working conditions set forth in that document. The Uniform Working Agreement is not, however, in effect as to the IARE.

(14) By letter to the 17 organizations dated October 30, 1963, with copy to the National Mediation Board, FEC advised that in its view the organizations had disentitled themselves to invoke the Board's services by refusing on October 18 to confer in the presence of a court reporter.

(15) Asserting that its agreements with all organizations are suspended during the pendency of a strike and that it is free to put into operation whatever rates of pay, rules, and working conditions it deems necessary to maintain operations, the defendant FEC has stated that it will revert to the September 1, 1963, Conditions of Employment or substantially similar conditions if prevented from operating under the September 24, 1963, Uniform Working Agreement.

(16) Although since August, 1963, the defendant railroad has been handling carload freight in quantities comparable to its pre-strike traffic, it has not restored less-than-carload freight or passenger service; its employment

has leveled off, apart from replacement of normal turnover, at approximately 850 employees; it describes the overall personnel policy which it has followed since February 3, 1963, as a "long range program" designed to achieve maximum efficiency with qualified employees. It has been the purpose of the railroad to recruit a work force of sufficient personnel to enable it to provide full service to the public under the duly negotiated collective bargaining agreements. There is no shortage of applicants available to the defendant FEC to expand its present manpower requirements.

320 (17) On July 31, 1963, FEC served a notice pursuant to Section 6 of the Act upon the 17 organizations listed in footnote 3,[3] in which it proposed to cancel and abolish the union shop provisions of its collective bargaining agreements with these organizations, effective September 1, 1963.

(18) After a meeting between representatives of the organizations and FEC on August 29, 1963, to discuss the notice was terminated because the parties could not agree whether to confer in the presence of a court reporter, the services of the National Mediation Board were requested on September 4, 1963, in a letter with attachments received by the Board, by 16 of the organizations on September 6, 1963. The Mediation Board assumed jurisdiction, and on October 11, 1963, docketed the dispute as Case No. A-7027.

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[3] American Railway Supervisors Association, Inc.; American Train Dispatchers Association; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway Carmen of America; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; International Association of Machinists; International Association of Railway Employees; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen, Oilers, Helpers, Roundhouse & Railway Shop Laborers; Joint Council Dining Car Employees; Order of Railroad Telegraphers; Railroad Yardmasters of America; Sheet Metal Workers' International Association; United Transport Service Employes (Red Caps); and United Transport Service Employes (Train Porters).

The matter is still pending before the Mediation Board. The American Train Dispatchers Association requested the Board's services in a separate application, which was docketed by the Board as Case No. A-7022. This matter is also still pending before the Mediation Board.

(19) Nevertheless, on September 9, 1963, FEC unilaterally put into effect the proposal contained in its notice of July 31, 1963, and purported to cancel and abolish the union shop provisions of its collective bargaining agreements with the respective labor organizations. By letter dated September 13, 1963, the carrier advised the Mediation Board that in its view the organizations had forfeited their right to invoke the Board's services by refusing on August 29 to confer in the presence of a court reporter.

(20) As to all non-operating crafts and classes on the FEC property which are represented by the organizations set forth in footnotes 1, 2 and 3, *supra*, the FEC is presently imposing the rules, rates of pay and working conditions embodied in its Section 6 proposals of September 24, 1963, and has announced its intention, if prohibited from continuing such rules, rates of pay, and working conditions, of returning to the rules, rates of pay and working conditions set forth in its September 1, 1963, "Conditions of Employment" (which are substantially the same). These presently imposed rules, rates of pay, and working conditions are materially different from the existing collective bargaining agreements in effect between the FEC and the organizations representing such crafts and classes of employees.

322 CONCLUSIONS OF LAW

(1) This Court has jurisdiction of the subject matter of this suit and of the parties. The jurisdiction of this Court to grant an injunction exists under 28 U.S.C. 1345, 1331, and 1337.

(2) The United States has standing to maintain this action. *In re Debs,* 158 U.S. 564, 584, 586 (1895).

(3) Section 2 of the Railway Labor Act (45 U.S.C. 152) provides in relevant part:

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.
>
> "Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.
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> • • • • • •
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> "Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.
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> • • • • • •
>
> "Eleventh. Notwithstanding any other provision of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

323 (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

* * * * * * *"

(4) Section 5, First of the Railway Labor Act (45 U.S.C. 155, First) provides:

"First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

(5) Section 6 of the Railway Labor Act (45 U.S.C. 156) provides:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services, of the Mediation Board have been requested

by either party, or said Board was proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

(6) The disputes as to rates of pay, rules, and working conditions involving the FEC's Section 6 notices of July 31, 1963, and September 24, 1963, and involving the institution by the FEC on September 1, 1963, of the "Conditions of Employment" and involving the negotiation of individual employment contracts on a wholesale basis during the period of February 3, 1963, to September 1, 1964, are "major" disputes within the meaning of the Railway Labor Act. *Elgin, J. & E.R. Co.* v. *Burley,* 325 U.S. 711, 722-724 (1945); *Florida East Coast Railway Co.* v. *Brotherhood of Railroad Trainmen, AFL-CIO* (C.A. 5, No. 21356, August 18, 1964), F. 2d .

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(7) The labor organizations listed in footnotes 2 and 3, *supra,* made a timely and proper invocation of the services of the National Mediation Board as to both the notice of July 31, 1963, and the notice of September 24, 1963.

(8) FEC's purported effectuation of the proposals contained in the notices of July 31, 1963, and September 24, 1963, before mediation could be commenced, violated Sections 2, Seventh; 5, First; and 6 of the Railway Labor Act (45 U.S.C. 152, (Seventh, 155, First, 156), and frustrated the purpose manifested in the Act to provide for orderly settlement of "major" disputes involving proposed changes in rates of pay, rules, and working conditions. *Florida East Coast Railway Co.* v. *Brotherhood of Railroad Trainmen, AFL-CIO, supra.*

(9) The institution, without pretense of compliance with any of the procedures of Section 6 of the Act, of wholesale changes in rates of pay, rules, and working conditions by the FEC on September 1, 1963, by the promulgation and purported effectuation of the "Conditions of Employment," for which each individual employee was made to sign a receipt agreeing to waive his rights under the existing collective bargaining agreement as to his craft or class and agreeing to accept instead said "conditions of Employment," violated Sections 2, First, Second, Seventh; and Section 5, First; and Section 6 of the Railway Labor Act (45 U.S.C. 152, First, Second, Seventh, 155, First, and 156).

326 (10) FEC's exaction of individual agreements by its replacement employees during the period February 3, 1963, to September 1, 1963, on terms as to rates of pay, rules, and working conditions substantially different from the collective bargaining agreements in force for the relevant crafts or classes of employees without the issuance of a Section 6 notice or with any of the procedures of Section 6 and without pretense at compliance with the Act, violated the Act's implied prohibition against bargaining with individual employees as to matters which are the subject of collective bargaining and violated Sections 2, First, Second, Seventh, and Section 5, First, and Section 6 of the Railway Labor Act (45 U.S.C. 152, First, Second, Seventh, 155, First, and 156).

(11) Injunctive relief to restore the status quo ante is proper in these circumstances to insure that the processes of mediation and negotiation can be carried on in the atmosphere of stability contemplated by the Act and in order to prevent the frustration of the statutory mechanism for orderly settlement of major disputes.

(12) The Norris-LaGuardia Act, 29 U.S.C. 101, et seq., is no bar to injunctive relief in the present circumstances to enforce the mandates of the Railway Labor Act.

(13) The fact that a strike is in progress on the FEC does not justify the wholesale abrogation of existing collective bargaining agreements, but does afford the defendant FEC, on appropriate application to this Court therefor and evidentiary showing in support thereof, the right
327 to make such changes in existing rules and working conditions as are reasonably necessary in order for the FEC to continue to operate during the strike. Any such changes as the FEC contends are justified by this exception must be presented to this Court on an item-by-item basis for review and determination hereafter.

(14) FEC's actions in violation of the Act as found hereinabove threaten irreparable injury to the public interest and to the rights of intervenors and the employees of defendant FEC under the Railway Labor Act for which there is no adequate remedy at law.

(15) Plaintiff, United States of America, and intervenors are entitled to a preliminary injunction restoring the status quo ante until further order of this Court.

Chief Judge

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328 Filed October 5, 1964

Intervenors' Proposed Preliminary Injunction

This matter coming on to be heard on the motion of the plaintiff, the United States of America, for a preliminary injunction, the complaints of the United States of America and intervenors, and the answer of defendant; and,

Each of the parties being represented by counsel and the Court having received testimony and other evidence and heard argument of counsel in light of the record before it; and the Court having made Findings of Fact and Conclusions of Law which are filed herewith, it is

ORDERED, ADJUDGED and DECREED:

1. That the defendant, Florida East Coast Railway Company (FEC), its officers, agents, servants, employees and attorneys, and all persons in active concert of participation with them, are enjoined restrained, until further order of this Court from:

(a) in any manner continuing in effect or implementing in any respect the changes in rates of pay, rules or
329 working conditions announced in FEC's notices of September 24, 1963, and July 31, 1963, except by agreement with the labor organizations representing the several crafts or classes of FEC's employees affected by said notices, or until the controversies have been finally acted upon by the National Mediation Board, as provided in Sections 5 and 6 of the Railway Labor Act (45 U.S.C. 155, 156);

(b) taking any action under any further notice attempting to make changes in rates of pay, rules or working conditions, except in accordance with the procedures of Section 6 of the Railway Labor Act (45 U.S.C. 156);

(c) in any manner continuing in effect or taking any action under FEC's "Conditions of Employment" promulgated September 1, 1963, except by agreement with the labor organizations representing the several crafts or classes of FEC's employees;

(d) making or continuing in effect any individual agreements with FEC's employees in any craft or class for which a collective bargaining representative has been designated, except in accordance with the provisions of the collective bargaining agreement for said craft or class; or

(e) making any other changes in rates of pay, rules or working conditions of its employees in crafts or classes covered by existing collective bargaining agreements except in accordance with the procedures of the Railway

Labor Act or except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court during the pendency of the current strike.

330 2. The defendant, Florida East Coast Railway Company (FEC), its officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, are further mandatorily required and directed, until further order of this Court,

(a) to revoke, cancel and annul all action taken and notices given purporting to put into effect the changes in rates of pay, rules and working conditions proposed in FEC's notices of July 31, 1963, and September 24, 1963, and in its "Conditions of Employment" of September 1, 1963;

(b) to reinstate and maintain the rates of pay, rules, and working conditions as embodied in existing collective bargaining agreements covering its employees until and unless said agreements are modified in accordance with the procedures of the Railway Labor Act or until and unless specifically authorized on application therefor by this Court; and

(c) to bargain in good faith with the labor organizations representing the crafts or classes of FEC's employees.

DONE AND ORDERED at Jacksonville, Florida, this day of , 1964.

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Chief Judge
United States District Court

331 Filed October 30, 1964

Findings of Fact and Conclusions of Law

This cause having been heard by the Court on the Motion of the Plaintiff, the United States of America, for a preliminary injunction, the complaints of the United States of America and the intervenors, and the answer of Defendant, and the Court having received testimony and other evidence in open court and heard argument from counsel for all parties, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Defendant, Florida East Coast Railway Company (FEC), is a corporation organized under the laws of the State of Florida and engaged in interstate commerce as a railroad "carrier" as defined in Section 1 of the Railway Labor Act (45 U.S.C. 151) (hereafter, the Act). It is subject to the provisions of said Act, and is classified by the Interstate Commerce Commission as a class 1 railroad. Defendant is licensed to do business and does business within the Middle Judicial District of Florida, and
332 has its principal place of business in St. Augustine, Florida.

2. Collective bargaining agreements between Defendant and the labor organizations listed in footnotes 1, 2 and 3, *infra*, have been in effect for many years governing rates of pay, rules and working conditions of certain crafts or classes of Defendant's employees. Said collective bargaining agreements, with subsequent changes agreed to by the relevant parties, have been in effect at all times material to this suit.

3. Since January 23, 1963, the 11 labor organizations listed in footnote 1,[1] representing certain crafts or classes of FEC's non-operating employees, have been legally on strike against FEC. This dispute began on September1, 1961, with the service of notices by the 11 organizations under Section 6 of the Act (45 U.S.C. 156) seeking a wage increase of 25 cents per hour and six months advance notice of any intended layoff or abolition of positions. FEC's counter-proposals, served on September 18, 1961, called for wage reductions of at least 20% for 39 groups of middle and lower-range employees in 6 craft groupings; for the establishment of new entry rates for 7 groups of employees in 2 crafts at 80% of existing levels, with
333 certain periodic increases; for the establishment of a flat $1.25 hourly rate for dining car waiters and other employees serving food and drinks; and for the elimination of all rules or provisions requiring more than 24 hours advance notice prior to abolition of positions or reduction of forces. This September 18, 1961, notice constitutes the outer limits of FEC's proposals during the dispute. The FEC, however, has never attempted or proposed to implement its September 18, 1961, counter-proposals or to change existing agreements as so proposed.

4. The immediate precipitating cause of the strike was FEC's announcement on January 16, 1963 (nearly three months after the National Mediation Board had advised, on October 22, 1962, that it was terminating its services as contemplated by the Act), that all non-operating jobs would be abolished as of January 23, 1963. For a brief

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[1] Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway Carmen of America; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Hotel & Restaurant Employees & Bartenders' International Union; International Association of Machinists; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; Order of Railroad Telegraphers; Sheet Metal Workers' International Association.

period after the strike began the railroad was completely shut down. On February 3, 1963, the Defendant resumed freight operations, using supervisory personnel and replacements for those employees who were not reporting for work.

5. These replacements in both the operating and non-operating crafts made individual agreements with FEC concerning their rates of pay, rules and working conditions, on terms substantially different from the collective bargaining agreements in force for the relevant crafts or classes.

6. On September 1, 1963, FEC, without filing any notice under Section 6 of the Act and without negotiation with the relevant labor organizations, unilaterally replaced the individual agreements under which the replacements
334 were working with a uniform set of rates of pay, rules and working conditions, also substantially different from the existing collective bargaining agreements. Each employee reporting for work thereafter was required to waive his rights under the existing collective bargaining agreement for his craft or class, and to agree individually by a signed receipt to accept instead FEC's new "Conditions of Employment", as they were called.

7. By August, 1963, the Defendant was performing 90.06% of the carload freight service performed in a comparable period the preceding year; by September, 1963, the figure was 95.53%; and currently the railroad is carrying carload freight at a volume equal to or in excess of seasonally comparable pre-strike levels, and is handling all the freight traffic that is presented to it.

8. By October 1, 1963, the Defendant was operating at this near-capacity level with about 650 employees, as opposed to the approximately 2000 employees it had in comparable pre-strike periods. Its vice-president in charge of operations stated on October 1, 1963, that by that time the

carrier had achieved nearly the full manpower levels required to maintain stable operations under the rates of pay, rules, and working conditions then actually in effect.

9. On September 24, 1963, FEC served a notice pursuant to Section 6 of the Act upon the 17 non-operating organizations listed in footnote 2,[2] in which it proposed a
335 new "Uniform Working Agreement", substantially the same as the September 1 Conditions of Employment and constituting a comprehensive revision of the rates of pay, rules and working conditions contained in the governing collective bargaining agreements with the 17 organizations.

10. After a meeting between representatives of the organizations and FEC on October 18, 1963, to discuss the notice was terminated because the parties could not agree whether to confer in the presence of a court reporter, the services of the National Mediation Board were requested by the 17 organizations on October 23, 1963, in a letter with attachments which was received by the Board on October 28, 1963. The Mediation Board assumed jurisdiction, and on October 31, 1963, docketed the dispute as Case No. A-7055.

11. One of the 17 organizations, the International Association of Railway Employees (IARE), resumed negotiations on October 22, 1963, and requested that it not be

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[2] American Railway Supervisors Association, Inc.; American Train Dispatchers Association; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway Carmen of America; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Dining Car Employees Union; International Association of Machinists; International Association of Railway Employees; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers; Order of Railroad Telegraphers; Railroad Yardmasters of America; Sheet Metal Workers' International Association; United Transport Service Employees (Red Caps); and United Transport Service Employees (Train Porters).

included in Case No. A-7055. These negotiations terminated on December 18, 1963, and the IARE invoked the Board's services on December 26, 1963. On Jan-
336 uary 6, 1964, the Board docketed the dispute as Case No. A-7093.

12. Cases No. A-7055 and A-7093 are still pending before the National Meidation Board.

13. Nevertheless, on October 30, 1963, FEC unilaterally put into effect the new Uniform Working Agreement contained in its notice of September 24, 1963. The non-operating employees of the carrier have been since that time and are at present actually working under the rates of pay, rules, and working conditions set forth in that document. The Uniform Working Agreement is not, however, in effect as to the IARE.

14. By letter to the 17 organizations dated October 30, 1963, with copy to the National Mediation Board, FEC advised that in its view the organizations had disentitled themselves to invoke the Board's services by refusing on October 18 to confer in the presence of a court reporter.

15. Asserting that its agreements with all organizations are suspended during the pendency of a strike and that it is free to put into operation whatever rates of pay, rules, and working conditions it deems necessary to maintain operations, the Defendant FEC has stated it will revert to the September 1, 1963, Conditions of Employment or substantially similar conditions if prevented from operating under the September 24, 1963, Uniform Working Agreement.

16. Although since August, 1963, the Defendant railroad has been handling carload freight in quantities comparable to its pre-strike traffic, it has not restored less-
than-carload freight or passenger service, its em-
337 ployment has leveled off, apart from replacement of normal turover, at approximately 850 employees;

it describes the overall personnel policy which it has followed since February 3, 1963, as a "long range program" designed to achieve maximum efficiency with qualified employees. It has not been the purpose of the railroad to recruit a work force of sufficient personnel to enable it to provide full service to the public under the duly negotiated collective bargaining agreements. There is no shortage of applicants available to the Defendant FEC to expand its present manpower requirements.

17. On July 31, 1963, FEC served a notice pursuant to Section 6 of the Act upon the 17 organizations listed in footnote 3,[3] in which it proposed to cancel and abolish the union shop provisions of its collective bargaining agreements with these organizations, effective September 1, 1963.

18. After a meeting between representatives of the organizations and FEC on August 29, 1963, to discuss the notice was terminated because the parties could not agree whether to confer in the presence of a court reporter, the services of the National Mediation Board were re-
338 quested on September 4, 1963, in a letter with attachments received by the Board, by 16 of the organizations on September 6, 1963. The Mediation Board assumed jurisdiction, and on October 11, 1963, docketed the dispute as Case No. A-7027. The matter is still pending

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[3] American Railway Supervisors Association, Inc.; American Train Dispatchers Association; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway Carmen of America; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; International Association of Machinists; International Association of Railway Employees; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen, Oilers, Helpers, Roundhouse & Railway Shop Laborers; Joint Council Dining Car Employees; Order of Railroad Telegraphers; Railroad Yardmasters of America; Sheet Metal Workers' International Association; United Transport Service Employees (Red Caps); and United Transport Service Employees (Train Porters).

before the Mediation Board. The American Train Dispatchers Association requested the Board's services in a separate application, which was docketed by the Board as Case No. A-7022. This matter is also still pending before the Mediation Board.

19. Nevertheless, on September 9, 1963, FEC unilaterally put into effect the proposal contained in its notice of July 31, 1963, and purported to cancel and abolish the union shop provisions of its collective bargaining agreements with the respective labor organizations. By letter dated September 13, 1963, the carrier advised the Mediation Board that in its view the organizations had forfeited their right to invoke the Board's services by refusing on August 29 to confer in the presence of a court reporter.

20. As to all non-operating crafts and classes on the FEC property which are represented by the organizations set forth in footnotes 1, 2 and 3, *supra*, the FEC is presently imposing the rules, rates of pay and working conditions embodied in its Section 6 proposals of September 24, 1963, and has announced its intention, if prohibited from continuing such rules, rates of pay, and working conditions, of returning to the rules, rates of pay and working conditions set forth in its September 1, 1963, "Conditions of Employment" (which are substantially the same).
339 These presently imposed rules, rates of pay, and working conditions are materially different from the existing collective bargaining agreements in effect between the FEC and the organizations representing such crafts and classes of employees.

Conclusions of Law

(1) This Court has jurisdiction of the subject matter of this suit and of the parties. The jurisdiction of this Court to grant an injunction exists under 28 U.S.C. 1345, 1331, and 1337.

(2) The United States has standing to maintain this action. *In re Debs*, 158 U.S. 564, 584, 586 (1895).

(3) The disputes as to rates of pay, rules, and working conditions involving the FEC's Section 6 notices of July 31, 1963, and September 24, 1963, and involving the institution by the FEC on September 1, 1963, of the "Conditions of Employment" and involving the negotiation of individual employment contracts on a wholesale basis during the period of February 3, 1963, to September 1, 1963, are "major" disputes within the meaning of the Railway Labor Act. *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 722-724 (1945); *Florida East Coast Railway Co.* v. *Brotherhood of Railroad Trainmen, AFL-CIO* (C.A. 5, No. 21356, August 18, 1964), F. 2d .

(4) The labor organizations listed in footnotes 2 and 3, *supra*, made a timely and proper invocation of the services of the National Mediation Board as to both the
340 notice of July 31, 1963, and the notice of September 24, 1963.

(5) FEC's purported effectuation of the proposals contained in the notices of July 31, 1963, and September 24, 1963, before mediation could be commenced, violated Sections 2, Seventh; 5, First; and 6 of the Railway Labor Act (45 U.S.C. 152, Seventh, 155, First, 156), and frustrated the purpose manifested in the Act to provide for orderly settlement of "major" disputes involving proposed changes in rates of pay, rules, and working conditions. *Florida East Coast Railway Co.* v. *Brotherhood of Railroad Trainmen, AFL-CIO, supra.*

(6) The institution, without pretense of compliance with any of the procedures of Section 6 of the Act, of wholesale changes in rates of pay, rules, and working conditions by the FEC on September 1, 1963, by the promulgation and purported effectuation of the "Conditions of Employment", for which each individual employee was made to

sign a receipt agreeing to waive his rights under the existing collective bargaining agreement as to his craft or class and agreeing to accept instead said "Conditions of Employment", violated Sections 2, First, Second, Seventh; and Section 5, First; and Section 6 of the Railway Labor Act (45 U.S.C. 152, First, Second, Seventh, 155, First, and 156).

(7) FEC's exaction of individual agreements by its replacement employees during the period February 3, 1963, to September 1, 1963, on terms as to rates of pay, rules, and working conditions substantially different from the collective bargaining agreements in force for the
341 relevant crafts or classes of employees without the issuance of a Section 6 notice or with any of the procedures of Section 6 and without pretense at compliance with the Act, violated the Act's implied prohibition against bargaining with individual employees as to matters which are the subject of collective bargaining and violated Sections 2, First, Second, Seventh, and Section 5, First, and Section 6 of the Railway Labor Act (45 U.S.C. 152, First, Second, Seventh, 155, First, and 156).

(8) Injunctive relief to restore the status quo ante is proper in these circumstances to insure that the processes of mediation and negotiation can be carried on in the atmosphere of stability contemplated by the Act and in order to prevent the frustration of the statutory mechanism for orderly settlement of major disputes.

(9) The Norris-LaGuardia Act, 29 U.S.C. 101, et seq., is no bar to injunctive relief in the present circumstances to enforce the mandates of the Railway Labor Act.

(10) The fact that a strike is in progress on the FEC does not justify the wholesale abrogation of existing collective bargaining agreements, but does afford the Defendant FEC, on appropriate application to this Court therefor and evidentiary showing in support thereof, the right

to make such changes in existing rules and working conditions as are reasonably necessary in order for the FEC to continue to operate during the strike. Any such changes as the FEC contends are justified by this exception must be presented to this Court on an item-by-item basis for
342 review and determination hereafter.

(11) FEC's actions in violation of the Act as found hereinabove threaten irreparable injury to the public interest and to the rights of intervenors and employees of Defendant FEC under the Railway Labor Act for which there is no adequate remedy at law.

(12) Plaintiff, United States of America, and intervenors are entitled to a preliminary injunction restoring the status quo ante until further Order of this Court. Since said preliminary injunction will issue upon the application of the United States, no requirement need be made for security. (See Rule 65, F.R. Civ. P.)

BRYAN SIMPSON
Chief Judge,
U. S. District Court

Jacksonville, Florida
October 30, 1964.

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343 Filed Oct. 30 1964

Preliminary Injunction

This matter coming on to be heard on the Motion of the Plaintiff, the United States of America, for a preliminary injunction, the complaints of the United States of America and intervenors, and the answer of Defendant; and,

Each of the parties being represented by counsel and the Court having received testimony and other evidence and heard argument of counsel in light of the record before

it; and the Court having made Findings of Fact and Conclusions of Law which are filed herewith, it is

ORDERED, ADJUDGED AND DECREED:

1. That the Defendant, Florida East Coast Railway Company (FEC), its officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, are enjoined and restrained, until further Order of this Court, from:

(a) in any manner continuing in effect or implementing in any respect the change in rates of pay, rules or working conditions announced in FEC's notices of Sep-
344 tember 24, 1963, and July, 31, 1963, except by agreement with the labor organizations representing the several crafts or classes of FEC's employees affected by said notices, or until the controversies have been finally acted upon by the National Mediation Board, as provided in Sections 5 and 6 of the Railway Labor Act (45 U.S.C. 155, 156);

(b) taking any action unnder any further notice attempting to make changes in rates of pay, rules or working conditions, except in accordance with the procedures of Section 6 of the Railway Labor Act (45 U.S.C. 156);

(c) in any manner continuing in effect or taking any action under FEC's "Conditions of Employment" promulgated September 1, 1963, except by agreement with the labor organizations representing the several crafts or classes of FEC's employees;

(d) making or continuing in effect any individual agreements with FEC's employees in any craft or class for which a collective bargaining representative has been designated, except in accordance with the provisions of the collective bargaining agreement for said craft or class; or

(e) making any other changes in rates of pay, rules or working conditions of its employees in crafts or classes

covered by existing collective bargaining agreements except in accordance with the procedures of the Railway Labor Act or except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court during the pendency of
345 the current strike.

2. The Defendant Florida East Coast Railway Company (FEC), its officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, are further mandatorily required and directed, until further Order of this Court,

(a) to revoke, cancel and annul all action taken and notices given purporting to put into effect the change in rates of pay, rules and working conditions proposed in FEC's notices of July 31, 1963, and September 24, 1963, and in its "Conditions of Employment" of September 1, 1963;

(b) to reinstate and maintain the rates of pay, rules, and working conditions as embodied in existing collective bargaining agreements covering its employees until and unless said agreements are modified in accordance with the procedures of the Railway Labor Act or until and unless specifically authorized on application therefore by this Court; and

(c) to bargain in good faith with the labor organizations representing the crafts or classes of FEC's employees.

3. In order to permit the Defendant to make necessary changes and adjustments in its operations, the injunctive provisions of numbered Paragraphs 1 and 2 hereof shall become effective fourteen (14) days after the entry thereof.

DONE AND ORDERED at Jacksonville, Florida, this
346 30th day of October, 1964.

BRYAN SIMPSON
Chief Judge, U. S. District Court

347 Filed Nov. 5, 1964

Return on Service of Writ

UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF FLORIDA

USA v. FLORIDA EAST COAST RAILWAY CO.
J-6755-C1, Ct. No. 64-107-Civ-J

I hereby certify and return that I served the annexed Preliminary Injunction on the therein-named Florida East Coast Railway Company by handing to and leaving a true and correct copy thereof with Raymond W. Wykoff, Vice-President of Florida East Coast Railway Co. personally at F.E.C. Offices at St. Augustine, Florida in the said District at 9:10 a. m., on the 31st day of Oct., 1964

JOHN E. MAGUIRE, SR.
United States Marshal.

By R. B. SAUCER, JR.,
R. B. Saucer,
Deputy.

Marshall's fees	3.00
Mileage	9.12
	$12.12

348 Filed Nov. 12, 1964

Motion for Stay of Portion of Order

Defendant has filed an application herein for approval of employment practices necessary to the effectuation of defendant's right to continue to operate and provide service to the public. Pending hearing and determination of this application, defendant moves for an order staying those portions of its order of October 30, 1964, with respect to enforcement of existing collective bargaining agreements in regard to strict observance of craft and seniority district restrictions, performance of craft work by exempt

and non-exempt supervisors, apprentice ratios and maximum age limitations for apprentices, contracting out of work when defendant does not have personnel available to perform work, performance of bridge tenders by supervisory employes or by security guard, furnishing seniority rosters, and enforcement of union shop provisions.

In support of its Motion for Stay of Portion of Order defendant shows, as follows:

1. Immediately upon receipt of the order of October 30, 1964, bulletins were prepared and issued for one hundred and fourteen positions immediately required to permit full compliance with the existing collective bargaining agreements. Until the bulletining periods provided in the respective agreements had expired, defendant could not anticipate whether sufficient employes would be available to permit full compliance with the Order of October 30, 1964.

2. Except as indicated herein and in its Application for Approval of Employment Practices defend-
349 ant has effectuated full compliance with the Order of October 30, 1964.

3. Defendant does not have sufficient personnel available to comply with the provisions respecting craft and seniority district restrictions, performance of craft work by supervisors, performance of various work which has been contracted out since commencement of the strike because of the lack of available personnel and it has been unable to secure sufficient qualified personnel to perform such work in accordance with existing collective bargaining agreements despite the fact that it has hired and trained employes since the commencement of the strike as rapidly as its capacities has permitted. Bridge Tending has as a necessary part of over all security been performed since the strike began by supervisory employes or security guards and must continue to be performed in this manner in the interest of security for the duration of the strike.

4. Defendant has no objection to furnishing seniority rosters, provided only that the use of the names of present employes be used only for legitimate purposes of the Organizations and not for continued harassment of these employes. Pending hearing and determination of this request Defendant has not furnished such rosters although such Information will be made available upon request for the policing of the various agreements.

5. The various organizations have discriminated against present employes and returnees with respect to the availability of union membership and pending hearing and determination of this request with respect to the union shop provisions of various agreements, application of these provisions should be stayed since the discrimination would in any event, render any request for discharge thereunder void and unforceable.

In support of this motion the affidavits of W. L. Thornton, President, Florida East Coast Railway, marked as Defendant's Exhibit 15; R. W. Wyckoff, Vice President and Director of Personnel, marked as Defendant's Exhibit 16; H. E. Hales, General Superintendent Motive Power, marked Exhibit 17; H. E. Webb, Superintendent Communications and Signals, marked as Defendant's Exhibit 18, which are submitted herewith and made a part hereof.

WHEREFORE, Defendant prays:

(A) An Order staying those portions of the Order of October 30, 1964, with respect to enforcement of existing collective bargaining agreements with respect to strict observance of craft and seniority district restrictions, performance of craft work by exempt and non-exempt supervisors, apprentice ratios and maximum age limitations for apprentices, contracting out of work when defendant does not have personnel available to perform, performance of bridge tending by supervisory employes or security guards,

furnishing of seniority rosters, and enforcement of union shop provisions pending hearing and determination of Defendant's Application for Approval of Employment Practices.

(B) An order setting Defendant's Application for Approval of Employment Practices for hearing.

(C) For such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

WILLIAM B. DEVANEY
William B. Devaney
1100 Shoreham Building
Washington, D. C. 20005

J. TURNER BUTLER
J. Turner Butler
814 Florida Title Building
Jacksonville, Florida

Attorneys for Defendant

Of Counsel:
STEPTOE & JOHNSON
1100 Shoreham Building
Washington, D. C. 20005

351 CERTIFICATE OF SERVICE
(Omitted)

352 **Affidavit of W. L. Thornton, President**

STATE OF FLORIDA }
COUNTY OF ST. JOHNS } ss:

1. My name is W. L. Thornton. and I am President of the Florida East Coast Railway Company.

2. I have reviewed with my various Department heads and have personally studied the problem of compliance with the Order of the Court of October 30, 1964. We

have already taken steps to comply fully with the terms of that Order except to the extent indicated in our application for approval of employment practices. The Railway must continue its use of exempt and scope supervisors to perform a certain craft work, must be able to use available employes without regard to strict craft lines, must be able to hire available qualified employes without regard to the ratio of apprentices to journeymen, or maximum age limitations on apprentices, and must continue the performance of bridge tending with supervisors or contract employes in the interest of security for the duration of the strike or it cannot continue to provide the service it is now providing to the public, nor can it continue the safe operation of the railroad which will quickly affect the safety of the employes and the public situated along the right of way or at crossings.

The immediate reduction of service which would be required in such event is not easy to fix with certainty. If exempt and scope supervisors were unable to perform any scope work, there are certain jobs which they are now performing which the Railway would not have other qualified employes available to perform. This work is essential to the continued operation of the Railroad, and to the
353 safety of our employes. In an overall evaluation, the Railway would be faced with a very substantial reduction in service of between 30% and 50% which although it would not be an immediate reduction to the full extent, such reduction would be required in a very short period of time because of the lack of sufficient qualified employes to perform the work in strict accordance with the various collective bargaining agreements.

In an effort to obtain the qualified employes necessary to perform the work of the various non-operating employes in full compliance with existing collective bargaining agreements, 114 jobs were bulletined. This represented the immediate number of jobs required to comply fully with the

agreements. In response to these bulletins, the Railway received a total of 3 bids from the striking employes, one from a person who was not qualified for the position bid on. The Railway has received letters from a number of the General Chairman stating, in effect, that they were instructing their members not to respond to these bulletins for the reason that they were engaged in a legal strike.

From the beginning of the strike the Railway has endeavored to hire and train employes as rapidly as possible. Many of the positions involved require little or no training and these positions were filled with a minimum of difficulty. With respect to the remainder, however, there is a long training period. The various craft agreements set forth the normal training time which is about 4 years in most cases. The Railway has endeavored to secure employes with as much training and experience as possible. Despite its efforts, few fully qualified craftsmen, meeting the
354 requirements of the craft agreements, have been found and the great majority of the employes hired since the strike began have not been fully qualified and have had no prior railroad experiences. This has meant that they must be placed at various levels of the training program in accordance with their experience and qualifications. Many of these new employes were highly qualified and highly skilled in certain phases of the work they performed; however, they were not fully qualified to do all the work and this has continued to necessitate the performance of certain craft work by supervisors, both exempt and scope. Training of these employes has required intensive supervision as well as supervisors working with trainees as part of their "on-the-job" training. This continues to be true.

Nor is the problem of training by any means limited to the mechanical crafts. Indeed, many of the positions of clerks not only have a long training period, but experienced employes are available from no other source than the

railroads. For example, the minimum training time for rate and division clerks is two years. The duties of this employe involves, in part, the checking of rates applied to waybills and prorating the divisions revenue due this Railway and other railroads. This work is essential to every railroad and our experience over the years, as well as the experience in the industry, is that the minimum of training time required is two years if the person is an extremely capable individual. The two-year period is by no means the average time actually required. With the strike the Railway was left without any rate and division clerks. It has hired three persons who are learning
355 to be rate and division clerks, but they are not fully qualified and much of the wok is still being done by various supervisory employes who have been rate and division clerks and who are the only fully qualified persons available for this work. The three trainees represent the maximum number of trainees the Railway can train at one time because of the necessity for close supervision and direction of their work, performance of much of the rate and division work being done by supervisors because of the lack of experience on the part of the trainees to perform it.

Many other examples could be given. In general the pattern is the same for all positions in the mechanical crafts as well as in the office, accounting and tariff positions which require long and intensive training.

Since the strike began on January 23, 1963, various changes have occurred with respect to new equipment and methods of operating which will substantially reduce the number of employes required to perform the work with this new equipment and new techniques as compared to prestrike requirements. In the Maintenance of Way Department, for example, centralized traffic control, which is now being installed, will when completed make the Railway a single track railroad with long passing tracks. This

will greatly reduce the number of main line miles of track to be maintained and will require fewer crossover switches and will reduce maintenance. A caterpillar front end loader with winch has been acquired for relocating switches and turnouts. This unit will perform work with 4 men in approximately 3 hours that formerly required 12-
356 man force three days. Track lining in the past was a slow and time-consuming operation, requiring 8 to 10 men. It is now being done by this machine utilizing one machine operator and one laborer. Ties are now unloaded from special tie cars which are equipped with an unloader requiring one operator and one laborer. Previously the unloading of ties from gondola cars by hand required 10 to 12 track laborers. Various other new machinery has been acquired, permitting surfacing of turnouts and switches, also a Diesel ballast regulator. In addition, "hi-rail" trucks have replaced motor cars and are equipped with radios, impact wrenches, electric tamping units, electric saws and drills and other more efficient tools so that these trucks with small forces are highly mobile and permit the performance of maintenance by the same crew over a greatly increased area. For these reasons the Railway will not require the number of employees in the Maintenance of Way Department that it had prior to the strike to comply fully with the various agreements. Prior to January, 1963, there were 259 employes in the Maintenance of Way Department. We currently have 115 and, except for one bridge gang of a foreman and 6 men, a crossing gang of a foreman and 8 men, and a temporary track removal gang of a foreman and 18 men, the Railway is now fully complying with the collective bargaining agreement. The work performed by the above-mentioned gangs is now being contracted out for the reason that the Railway does not have now, and did not have at the time the work was contracted out, qualified foremen to supervise the work. Without qualified foremen, the laborers would be of no value in performing this work.

357 Prior to the strike, bridge tenders were covered by the Maintenance of Way Agreement. Since commencement of the strike, for security reasons, the Railway has had to perform this work with supervisory or contracted security guards as part of the overall security required by strike conditions. From the beginning of the strike on January 23, 1963, the Railway has been beset with a long series of acts of sabotage against its property and equipment, which have included 9 actual dynamitings, two attempted dynamitings, attempted derailments, actual derailments, misaligning of rail, cocking of switches, placing heavy chains around the rails and placing of derailers on the track. One of the dynamitings involved the bridge at Rose Bay, another involved a bridge at North Miami, a third involved a bridge in the vicinity of Vero Beach, and a fourth involved a bridge at Mile Post K-8.67 south of Fort Pierce on the Lake Harbor Branch. As a result of sabotage there has been a total of 16 locomotives and 162 cars derailed or thrown from track. Attempted dynamitings of a bridge in the vicinity of Fort Pierce was thwarted by agents of the F.B.I. The Railway has necessarily had to take extensive security precautions and as a part of the overall security has performed the duty of bridgetending with supervisors or by security guards. It must continue to do so in order to maintain proper security. Moreover the General Chairman of the Brotherhood of Maintenance of Way Employes advised the Company that the employes he represents have been instructed not to respond to the bulletins because they were engaged in a legal authorized strike.

358 In the Transportation Department a very much smaller force is now employed than was employed prior to the strike. To a very considerable extent this difference in employment level is attributable directly to the fact that the Railway, because of the numerous acts of sabotage, vandalism and harassment, is not providing passenger service. To the extent possible, the Railway

has already taken steps to fully comply with existing agreements insofar as this Department is concerned. There are several instances where supervisory employes are performing scope work. As has been true with the Maintenance of Way Department, changes in techniques and equipment has resulted in a reduction in the number of employes required for the performance of certain tasks. For example, billing which formerly required the retyping of the billing information from the waybill to the freight bill is now reproduced by means of a Xerox machine, the waybills being used in lieu of freight bills. I.B.M. punch card equipment is also being substituted in various instances for records formerly maintained and has resulted in a considerable lessening of manpower requirements. Nevertheless, we are still forced to use exempt and non-scope supervisors to perform scope work and are required to use employes to perform work they are qualified to perform without regard to strict craft lines. The Railway has hired and trained employes in this Department as rapidly as possible but still does not have sufficient qualified employes to comply insofar as work by supervisors and craft restrictions are concerned.

In the Accounting Department the Railway is still compelled to use excepted personnel to perform various
359 jobs previously filled by scope employes. The Railway has advertised 17 positions which, had it received qualified employes, would have permitted it to comply fully with existing agreements in the Accounting Department. In the absence of qualified employes, the work must continue to be performed by exempt employes. Not only has this long-range implications, but in all phases of the Railway's accounting procedures, reports to the I. C. C., interline freight divisions currently in the process of completion cannot be completed if the supervisory employes are not permitted to complete them. This will mean that these reports will be immediately delayed. All 17 of the positions bulletined represent jobs requiring intensive

training and for the most part require accounting experience. From the beginning of the strike the Railway has endeavored to secure additional qualified employes to fill these positions but has been unable to do so. Although the lack of adequate accounting personnel will not immediately stop the running of any trains, no railroad can continue to operate for any appreciable period without adequate accounting procedures. Moreover, regular reports are required by the Interstate Commerce Commission and various other governmental agencies which cannot be prepared unless the exempt employes continue to perform this work.

From the beginning of the strike, employes hired by the Railway or who returned to work were subjected to extensive harassment, abuse and physical violence. "Scab Lists" were circulated containing the names and telephone numbers of the employes, and the employes of the Railway were repeatedly called at all hours of the day or night and they, and their families, were subjected to violent and abusive language and harassment consisting of shots being fired into their homes, paint being thrown on their houses and automobiles, automobile tires slashed, bricks thrown through windows and through wind shields of their automobles. For this reason, the Railway has declined to publish the names of the current employes by posting for public inspection, or distributing copies of seniority rosters to the various organizations. The Railway feels an obligation to its present employes to take whatever reasonable steps it can to protect them from harassment and abuse. The Railway has stated to the Court that it will furnish seniority lists to the various organizations with the request that the recipient officials be subject to the Order of the Court to use the names of the present employes only for legitimate purposes and that if any misuse of seniority information is made that they be answerable to the Court in contempt.

From the beginning of the strike, returnees have been expelled and fined by the organizations and, even though

many new employes have made application for membership, I am informed that no current employe has been admitted to membership despite numerous applications having been made. For this reason, the Railway believes that the provision respecting the Union Shop Agreements of the various organizations should be modified to provide that no Union Shop Agreement shall be valid, or enforceable until such time as the organization demonstrates that membership is available without discrimination to all present employes.

W. L. THORNTON
W. L. Thornton

SWORN TO AND SUBSCRIBED before me, this 11th day of November, 1964.

W. D. RIDGE
Notary Public, State of Florida at Large.
My commission expires: 9-23-67

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361 **Affidavit of Raymond W. Wyckoff, Vice President and Director of Personnel**

STATE OF FLORIDA }
COUNTY OF ST. JOHNS } ss.

This day personally appeared before me RAYMOND W. WYCKOFF, who, being by me duly sworn, deposes and says:

1. My name is RAYMOND W. WYCKOFF and I am Vice President and Director of Personnel of Florida East Coast Railway Company.

2. In accordance with the preliminary injunction entered in United States vs. Florida East Coast No. 64-107-Civ-J, I have notified the various organizations of the revocation, cancellation and annullity of my letters of October 30, 1963 and September 9, 1963. Furthermore, I have taken steps to have reinstated the rates of pay, rules and working con-

ditions in existing collective bargaining agreements by re-establishing the rates of pay, holiday pay and vacation eligibility requirements, hours, etc., the bulletining of job descriptions in accordance with existing agreement and advertisement through bulletining procedures of one-hundred and fourteen jobs which the various department heads advised me were immediately required to effect compliance with existing collective bargaining agreements.

3. Because of the lack of qualified personnel it has been necessary since the commencement of the strike to utilize the personnel available to perform whatever work is required that they are qualified to perform without regard to strict craft lines. In the same manner it has been necessary to permit and require exempt supervisory personnel to perform scope work, in part because of the lack of qualified scope employes and in part because of the necessity for the use of employes not fully qualified in the work involved and to work with them in the course of their on the job training which requires that the supervisors perform work they are not qualified to perform.

362 4. The employment of new employes, most of whom were not at the time of employment qualified craftsmen or journeymen under craft rules, has resulted in the employment of a larger number apprentices or trainees than normally permitted by various craft agreements.

5. The shortage of qualified employes has also required that scope foremen perform work of the craft which they supervise. As has been true with exempt supervisors, foremen have been, and are now, required to perform work of the craft in the course of training new employes as well as performing, in many instances, work which they are the only available qualified persons to perform.

6. Because of the lack of qualified employes, Florida East Coast has, since the commencement of the strike, been

required to contract for the performance of certain work which was previously performed by its own employes. Such contracting out has involved Maintenance of Way and Signal Department work which was contracted out from the beginning of the strike. Some Maintenance of Way work contracted out from the beginning of the strike has recently been resumed by the Florida East Coast with the acquisition of new equipment with which to perform this work. In the main, however, Maintenance of Way work contracted out from the commencement of the strike is still being contracted out because of the lack of available personnel to perform it. In the Signal Department, installation of CTC, for example, had to be contracted out because of the lack of qualified employes to install this new equipment.

7. The one-hundred and fourteen jobs bulletined represented only the immediate requirement to permit full compliance with existing collective bargaining agreements. These positions must be filled before other positions would be available, for example, qualified foremen are necessary before track maintenance now being contracted out can be performed by Florida East Coast. Unless and until qualified supervision is available, the accompanying laborers and unskilled or semiskilled employes cannot be used. Seasonal requirements will also affect the additional employes required to comply fully with existing collective bargaining agreements.

363 8. Only three bids from the striking employes were received in response to the one-hundred and fourteen positions advertised and one of these bidders was not qualified for the position she bid for. Without these additional employes Florida East Coast cannot comply fully with existing collective bargaining agreements with respect to the matters mentioned above, that is, craft and seniority district restrictions, performance of scope work by exempt and non-exempt supervisors, apprentice ratios and ap-

prentice age limitations. If required to attempt to work only in strict accordance with existing collective bargaining agreements despite the lack of qualified employes, Florida East Coast would be compelled to reduce service to the public by not less than 30 to 50%. The reduction would not, in the sense, represent an immediate reduction of the maximum but would, in a very short time, require such reduction. The reason for this being that some work, such as maintenance of way and maintenance of equipment could be deferred for a short period of time but within a very short period the effect of the lack of required inspection, maintenance and repair would seriously disrupt all service. Quite possibly, if the Railway were not able to use supervisors to perform various jobs which are essential to the continued operation of the railroad, the effect of the Order of October 30 could be to stop the operation of the railroad immediately and completely.

9. From the commencement of the strike, Florida East Coast has hired and trained new employes as repidly as possible. A total of 474 non-operating craft applicants were processed during the period January 1-October 31, 1964. The jobs requiring least skill and experience were, and are, the most readily filled. The problem of maintaining an even employment rate is the training time required. For example, as indicated in the various craft agreements, the normal training time in most of the crafts is four years. In hiring new employes since the commencement of the strike, few fully qualified craftsmen have been available, and the available applicants have
364 possessed widely varied degrees of skills and experience. With the supervision available only a limited number of persons can be trained at a given time. Consequently, both the limited number of qualified applicants possessing a reasonable degree of experience in the various crafts, together with the limited number of qualified supervisors to direct their training and work, has severely limited the number of employes Florida East

Coast has been able to employ and train. By way of illustration, when one new employe is hired, he can work under the direct supervision of a foreman and the foreman can by working with him see that the work is properly performed, perform such portions as the trainee is not qualified to perform, and as his experience expands, maintain a close supervision over his work. Because these new employes have been largely unqualified as craftsmen, it has not been possible to "turn them loose" without the continued close supervision and control of the supervisor with the supervisor continuing to perform various work the new employe is not quailfied to perform. Consequently, when the second person in the same craft is employed, he requires intensive supervision and direction and the first employe while possessing some skills and having attained a certain proficiency still requires more than normal supervision and direction and because he is not yet fully qualified, cannot perform all duties of the craft which the supervisor must continue to perform. As each additional craftsman is added, the same problem has continued and because, in most of the crafts there have been few, if any, fully qualified craftsmen, the Railway has necessarily had to limit the numbr of persons employed in accordance with its ability to train them. The modifications requested are necessary for the following reasons:

1. *Craft and Seniority District Restrictions.* As indicated, since the commencement of the strike, Florida East Coast has had no alternative as a result of the lack of qualified employes but to use such personnel as it has available to perform such tasks as they are qualified to perform without regard to strict craft lines or seniority district restrictions. For example, an employe who
365 is classified as an electrician may also be a qualified welder, or may be qualified to do other work of a carman. When welding is required, he has been used to weld or when his services to perform other work as a carman

were required he has been used in such capacity. Similarly, the skills of a clerk working at a point where two seniority districts are located are utilized, if necessary, in both seniority districts. Because of the almost total lack of response to the jobs advertised pursuant to the order of the Court FEC must continue to utilize the services of the employes it has available to perform the jobs they are qualified to perform.

2. *Scope Work by Supervisors.* As indicated, supervisors have been, and are now, being required and permitted to perform craft work both because of the lack of qualified scope employes to perform it and because of the necessity for these supervisors to work with new employes who are largely unqualified and who must be trained as they work.

3. *Apprentice Ratio.* The lack of qualified craftsmen has required the hiring of employes not fully qualified which in turn has resulted in a disproportionate ratio of apprentices and trainees to journeymen.

4. *Apprentice Maximum Age Limitation.* Some of the craft agreements contain limitations on the maximum age of individuals entering apprenticeship programs. Because of the severe shortage of qualified employes, Florida East Coast has been compelled to employ persons not fully qualified as apprentices at various levels depending upon their qualifications and experience. Strict compliance with the apprentice maximum age limitation will further limit Florida East Coast's ability to hire and train qualified employes.

5. *Scope Work by Foremen.* As was indicated above, Florida East Coast has had to permit and require non-exempt foremen to perform scope work of the craft they supervise. This has been required by the lack of qualified journeymen and by the necessity for working with largely unqualified employes in the course of their on the job training.

366 6. *Contracting.* The contracting out of work is not prohibited by any of the agreements and much work has always been contracted out. Since the strike, however, Florida East Coast, has had to contract out work it previously performed, such as maintenance of way and signal work. Florida East Coast believes there is no limitation on its right to do so because there are no qualified employes available; however, to avoid any contention that the Florida East Coast is not complying with the Order of the Court because of this practice, a specific modification is requested with regard to this practice.

The contracting out of work has been required since the commencement of the strike by the lack of qualified personnel. Defendant must continue to contract out such work where it has no qualified employes available.

7. *Security.* Since the commencement of the strike, defendant has been required by the numerous acts of sabotage, vandalisim and harassment including nine dynamitings, two attempted dynamitings, numerous instances of interference with switches, obstructions on tracks, attempted derailments, etc., to institute and maintain various security measures essential to the protection of its plant equipment and property. The only portion of this work covered by any agreement is the work of bridge tenders, and since the commencement of the strike this work, as well as all other measures relating to security, has been performed by supervisory employes or has been contracted out. Defendant must continue to perform this work and must perform it outside any existing agreement for the duration of the strike.

8. *Seniority Rosters.* Defendant is entirely willing to provide upon request seniority information required for the policing of the various collective bargaining agreements. Because of the past harassment of employes working during the period of the strike, defendant has not furnished copies of seniority rosters. Defendant is en-

tirely willing to furnish such seniority rosters provided only that it requests the Court, by Order, to provide
367 that they shall be used only for the legitimate policing of agreements and not for harassment or annoyance of employes now working.

9. *Union Shop.* As has been demonstrated, union membership is not available under the terms of the various union shop agreements, the agreement is not enforceable as to any employe with respect to whom membership is not available. Unless the Order of the Court is modified, present employes will be subjected to continued uncertainty and the dilemma of attempting to comply by asking for membership which is not available to them. Some organizations have refused to supply application forms, some have accepted applications but have not acted on the applications, some have expelled former members, some have held checks of members who have returned to work without either cashing the check or returning it. In not one instance has any persent employe, so far as I have been informed, been admitted to membership by any organization although, to my personal knowledge many have made application.

R. W. Wyckoff
R. W. Wyckoff

Sworn to and Subscribed before me, this 11th day of November, 1964.

W. D. Rider
Notary Public
State of Florida at Large

My Commission expires:
9-23-67

368 **Affidavit of H. E. Hales, General Superintendent Motive Power**

STATE OF FLORIDA
COUNTY OF ST. JOHNS } ss.

This day personally appeared before me H. E. HALES, who, being by me duly sworn, deposes and says:

1. My name is H. E. Hales, and I am General Superintendent Motive Power, Florida, East Coast Railway Company.

2. Upon the entry of the Order in this case, I bulletined 52 jobs immediately required by my Department to permit full compliance with existing collective bargaining agreements. Only one (1) bid was received from the striking employes in response to these bulletins.

3. The rates of pay, terms and conditions of employment in existing bargaining agreements have been reinstated except in the following respects:

(a) Since the commencement of the strike we have had to use excepted supervisors to perform scope work. Some supervisors spend a relatively small percentage of their time in the performance of such work, while others spend a majority of their time in the performance of scope work. This has been and is still, necessary because of the lack of qualified craftsmen and scope supervisors and because of the necessity of these exempt supervisors working with new employes, who are largely unqualified. Even where employes have become fully qualified in certain phases of the work
369 they perform, they are not fully qualified in all phases in many instances and work for which they are not so qualified must still be performed by exempt supervisors.

(b) Scope foremen have been, and still are, required to perform work of the craft which they supervise for

the same reasons as indicated above with respect to the excepted supervisors.

(c) Some of the craft agreements contain a maximum age limitations on apprentices. Since commencement of the strike, Florida East Coast has been required to employ persons not fully qualified under craft rules and for the most part totally inexperienced in railroad work. Consequently, they have had to be placed in the apprenticeship program at various levels, depending upon their qualifications and experience. In some instances the persons have exceeded the age limitations. Based on our experience it is apparent that this practice will have to continue because of the almost total lack of availability of fully qualified craftsmen with railroad experience.

(d) The lack of qualified craftsmen and the necessity for hiring persons not fully qualified under craft rules has resulted in a higher ratio of apprentices, or trainees to qualified craftsmen than permitted by various agreements. Florida East Coast must continue this training if it is to ultimately have sufficient employes qualified by craft rules.

(e) Since commencement of the strike, the Florida East Coast has had to use the available personnel to
370 perform whatever duties they are qualified to perform. We have in my Department many employes who are qualified machinists, for example, who are also qualified to perform the work of carmen or other crafts. Where the carmen skill is required and no other person is available to perform the work we have necessarily used the machinist to perform this work. Craft lines cannot be strictly observed unless and until sufficient qualified employes are available to perform it.

4. It is difficult to assess accurately the immediate impact on the operation of my Department if operations must be performed only in strict accordance with existing agreements. Exempt and scope supervisors must be permitted to perform certain scope work or the Railroad will be left totally without various essential skills necessary to the operation of this Department, including car inspectors, railroad Diesel mechanics, railroad Diesel electricians, etc., without which the Railroad cannot continue to operate. We have endeavored since the commencement of the strike to secure or train employes for such work, and such efforts are continuing, but the fact remains that at the moment we do not possess and have been unable to acquire such employes.

In like manner, the use of available employes to perform work across craft lines has been the only way the Railway has been able to supply the deficiency of required skills and such limitations would prevent the performance of essential work. Overall my Department is now approximately
371 30% short of the personnel required to permit full compliance with the agreements. The deficiency in personnel has been, and still is, being supplied by the use of supervisors both excepted and non-excepted and the performance of work by existing employes across craft lines. If we were not permitted to operate in this manner, our operations would have to be curtailed accordingly and while this overall curtailment would probably not cause an immediate reduction in service, it would have this result very shortly as the maintenance and repair of locomotives and rolling stock would be deferred. The performance of service must be reduced in accordance with the ability of the Railroad to provide necessary inspections, maintenance and repair of equipment, the standard of which is now prescribed by several Federal Laws. In this regard, for example, each locomotive must undergo monthly, quarterly, semi-annual and annual inspections, and failure to complete such inspections and repair work as required

by the Locomotive Inspection Act, Safety Appliance Act and other existing statutes prevents the further use of such locomotive or equipment. The reduction of our ability to perform the work by 30%, or a prohibition from using our personnel, except as required by the agreements, would prevent adequate maintenance and repair of locomotive and rolling stock as compared to the rate of maintenance required to sustain the equipment from general rapid depreciation.

Requisite and specified heavy maintenance to our motive power equipment cauld be contracted to outside parties at considerable additional cost, and heavy repairs to freight train cars could be contracted to shops or works of private car lines. The Railway must be permitted to
372 perform the work in the manner now existing, or contract it out, or it cannot operate.

H. E. HALES
H. E. Hales

SWORN TO AND SUBSCRIBED before me, this 11th day of November, 1964.

W. D. RIDGE
Notary Public, State of Florida at Large.
May commission expires: 9-23-67

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373 **Affidavit of H. E. Webb, Superintendent Communications & Signals**

STATE OF FLORIDA }
COUNTY OF ST. JOHNS } ss.

This day personally appeared before me H. E. Webb, who being by me duly sworn, deposes and says:

1. My name is H. E. Webb, and I am Superintendent Communciations and Signals, Florida East Coast Railway Company.

2. At the present time the Florida East Coast has no signal repair shop and does not have available qualified personnel to perform such work.

3. In accordance with established practice which existed prior to the strike, the Company has, in the absence of a signal repair shop, been compelled to resort more extensively to unit exchange of equipment.

4. The Florida East Coast is in the process of converting its 4400-volt line to a 220-volt line. Because of lack of sufficient qualified personnel, most of this work has been contracted out, and the work is now largely complete.

5. The Florida East Coast is installing C.T.C. Because of the lack of qualified personnel since the commencement of the strike, we have had to contract out the installation of this new equipment. Our personnel, even if now available for work, would not immediately be qualified to perform this work since it involves entirely new equip-
374 ment with which they have had no familiarity.

6. Since the commencement of the strike we have hired and trained new employes as rapidly as possible. We have been unable to secure sufficient qualified craftsmen and have necessarily had to train largely unqualified employes. We are very limited in the number of employes we can train by the lack of qualified supervisory personnel to provide both the "on-the-job" training and at the same time perform necessary maintenance of signals which they, because of the lack of qualified employes, are the only qualified persons available to perform.

7. The Florida East Coast does not have available the personnel to operate its Communciations and Signals Department except in the manner it is now operating. Communications and signals are essential to the continued operation of the Railroad.

8. New equipment and better tools, elimination of high voltage transformers, etc. will reduce the overall require-

ments of the Communications and Signals Department by approximately one-half over pre-strike requirements. However we now have about one-half of those employes.

9. Unless the Railway continues to operate with the personnel available in the manner it is now operating, maintenance of communications and signals will be paralized and the continued operation of the entire railroad will be seriously crippled.

H. E. WEBB
H. E. Webb

SWORN TO AND SUBSCRIBED before me, this 11th day of November, 1964.

W. D. RIDGE
Notary Public, State of Florida at Large.
May commission expires: 9-23-67

---

375 Filed Nov. 12, 1964

Application of Defendant for Approval of Employment Practices

Pursuant to the preliminary injunction entered in this action on October 30, 1964 defendant Florida East Coast Railway has:

(a) revoked, cancelled and annulled its letters of October 30, 1963 and September 9, 1963 purporting to put into effect changes in rates of pay, rules and working conditions as contained in defendant's notices of September 24, 1963 and July 31, 1963, respectively.

(b) reinstated the rates of pay, rules and working conditions as embodied in existing collective bargaining agreements including:

1. strict compliance with rates of pay, hours, etc. embodied in existing collective bargaining agreements.

2. holiday pay and vacation eligibility requirements and payments in accordance with existing collective bargaining agreements.

3. bulletining of job descriptions in accordance with existing collective bargaining agreements.

4. the advertising through bulletining procedures of one-hundred and fourteen jobs immediately required to effect compliance with existing collective bargaining agreements with respect to craft restrictions, performance of scope work by supervisors, apprentice ratios, performance of work by non-exempt foremen.

376 Defendant received a total of three bids, one of whom was not qualified for the position bid upon. In other words, one-hundred and tweleve of the additional positions immediately required were not bid upon by any qualified striking employes, and in fact, General Chairmen of five of the eleven striking cooperating non-operating unions replied in writing, that they were instructing their members not to respond to these bulletins. Copies of these letters are attached as defendant's exhibits 1 through 14.

Defendant therefore requests that the Court's Order of October 30 requiring compliance with existing collective bargaining agreements be modified in the following respects, for the reason that the following employment practices are reasonably necessary to the effectuation of defendant's right to continue service under strike conditions:

1. Defendant shall not be deemed in violation of any existing collective bargaining agreement for failure to observe craft or seniority district restrictions.

2. Defendant shall not be deemed in violation of any existing collective bargaining agreement by requiring and permitting supervisors to perform craft work so long as it does not have sufficient qualified personnel.

3. Defendant shall not be deemed in violation of any existing collective bargaining agreement by exceeding the

apprentice and/or trainee ratios or maximum age limitations contained in any such agreement.

4. Defendant shall not be deemed guilty of violating any existing collective bargaining agreement by permitting and requiring non-exempt foremen to perform scope work of the craft they supervise so long as defendant does not have sufficient qualified personnel.

5. Defendant shall not be deemed in violation of any existing agreement, assuming for the purpose of this application only that any limitation exists, which defendant expressly denies, by virtue of the contracting out of work which it does not have personnel available to
377 perform.

6. The provisions of the Maintenance of Way Agreement shall not limit in any way defendant's right to perform the work of bridge tender by supervisory or contract empolyes, during the continuance of the strike.

7. Defendant shall be required to furnish seniority rosters only upon the expressed order of this Court conditioning receipt of such rosters by the general chairman or other designated official of each organization requesting such lists that the names of present employes will be used only for the legitimate policing of its collective bargaining agreement and that if any misuse of the information is made, such official shall be answerable to the Court in contempt.

8. That the union shop provisions of each of the collective bargaining agreements be declared void and unenforceable as to new employes hired since January 23, 1963, or as to returnees unless and until the Organization, including both the local and international, demonstrates that membership is available to all such new employes or returnees without discrimination and that these employes shall not have less than thirty days from the date of such notification of the availability of union membership to apply for such membership.

The foregoing modifications of existing collective bargaining agreements are necessary to permit the continued performance of service the railway is now affording the public. Defendant cannot comply with the existing collective bargaining agreements without the above required modifications without drastically reducing service it is now rendering to the public. Unless the above requested modifications are granted, it will be necessary to reduce present service by not less than 30 to 50%.

WHEREFORE, defendant prays:

(A) That the Order of October 30, 1964 be modified to permit defendant to operate without observing strict
378 craft lines or seniority districts; to permit exempt and non-exempt supervisory personnel to perform craft work; to continue to employ necessary apprentices and trainees without regard to ratios limiting the use of such apprentices and trainees; to continue to hire qualified apprentices and trainees without regard to maximum age limitations; to continue present contracting out of work with respect to which it does not have qualified personnel to perform; to continue to perform the work of bridge tenders with supervisory employes or by contracting out such work; to furnish seniority lists only upon order of the Court which will protect the present employes from harassment or abuse and limiting use of seniority lists to legitimate purposes of policing collective bargaining agreements; and to declare union shop agreements void and unenforceable as to employes now working, unless and until, each organization which seeks to enforce its union shop agreement demonstrates that membership is available, without discrimination, to all present employes.

(b) That the Order of the Court of October 30, 1964 be temporarily stayed and enjoined with respect to the provisions set forth in paragraph (A) above pending hearing and determination of this application.

(C) Defendant be granted such further and other relief as to the Court may seem just and proper.

Respectfully submitted,

WILLIAM B. DEVANEY
William B. Devaney
1100 Shoreham Building
Washington, D. C. 20005

J. TURNER BUTLER
J. Turner Butler
814 Florida Title Building
Jacksonvile, Florida

Of Counsel: *Attorneys for Defendant*

SETPTOE & JOHNSON
1100 Shoreham Building
Washington, D. C. 20005

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379 STATE OF FLORIDA)
COUNTY OF ST. JOHNS) ss.

Before me, the undersigned authority, personally appeared R. W. WYCKOFF, who, being first duly sworn, deposes and says: That he is Vice President and Director of Personnel of Defendant, Florida East Coast Railway Company, that he has read the foregoing application for approval of employment practices and that the facts stated therein are true to his information and belief.

R. W. WYCKOFF
R. W. Wyckoff

Sworn to and subscribed before me this 11th day of November, 1964.

W. D. RIDGE
Notary Public
State of Florida At Large

My commission expires:
9-23-67

380 Filed Nov. 12, 1964

Notice of Hearing on Motion for Stay of Portion of Order

TO: Mr. William J. Hamilton, Jr.
Assistant United States Attorney
Post Office Building
Jacksonville, Florida
Messrs. Howard E. Shapiro and
Peter B. Edelman, Attorneys
Department of Justice
Civil Division
Washington, D. C.
Attorneys for Plaintiff

Messrs. Neal Rutledge and
Allen Rutledge, Attorneys
Rutledge and Milledge
601 Flagler Federal Building
111 Northeast First Street
Miami, Florida, 33132
Attorneys for Intervenors

PLEASE TAKE NOTICE that the undersigned will call up its motion for stay of portion of Order before the Honorable Bryan Simpson, Chief Judge United States District, at the United States Court House, Jacksonville, Florida, at 9:30

A.M., November 13, 1964, or as soon thereafter counsel may be heard.

Please govern yourselves accordingly.

WILLIAM B. DEVANEY
William B. Devaney
1100 Shoreham Building
Washington, D. C. 20005

J. TURNER BUTLER
J. Turner Butler
814 Florida Title Building
Jacksonville, Florida

Of Counsel: *Attorneys for Defendant*

STEPTOE & JOHNSON
1100 Shoreham Building
Washington, D. C. 20005

---

381 Filed Nov. 12, 1964

Order

Motion for Stay of Portion of Order of October 30, 1964, pending hearing on Defendant's Application for Approval of Employment Practices granted. Hearing for 12:00 o'clock noon, November 13, on Notice of Motion for Stay cancelled.

Hearing on Defendant's Application for Approval of Employment Practices set for November 20, 1964, at 2 o'clock P. M. in the United States Courthouse, Jacksonville, Florida.

DONE AND ORDERED at Jacksonville, Florida, this 12th day of November, 1964.

BRYAN SIMPSON
Chief Judge
United States District Court

383 Filed Nov. 19, 1964

Order

For good cause shown, it is

ORDERED that the hearing on Defendant's application for approval of employment practices, previously set herein for November 20, 1964, at 2:00 o'clock P. M., in the U. S. Courthouse, Jacksonville, Florida, is hereby re-set for 9:30 A. M., Monday, November 30, 1964.

The stay of portions of this Court's Order of October 30, 1964, previously entered herein, is continued until 9:30 A. M., Monday, November 30, 1964.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 19th day of November, 1964.

BRYAN SIMPSON
Chief Judge
United States District Court

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384 Filed Dec. 3, 1964

Order

This cause having come on for further hearing on the Application of Defendant for Approval of Employment Practices pursuant to Paragraph 1(e) of the Preliminary Injunction entered herein on October 30, 1964; and the Court having received testimony and other evidence in open court and heard argument of counsel, the Court finds that in order to enable the Defendant to effectuate its right of self help during the strike which has been in progress since January 23, 1963, certain departure from the collective bargaining agreements presently in force on Defendant's property, as hereinafter set forth, are reasonably necessary; and further finds that there is no showing of reasonable necessity for departure from said col-

lective bargaining agreements in any other respect; and it is, therefore,

ORDERED:

1. Defendant's request that it shall not be deemed in violation of any existing collective bargaining agreement for failure to observe craft or seniority district
385 restrictions, is denied.

2. Defendant's request that it shall not be deemed in violation of any existing collective bargaining agreement by requiring or permitting supervisors to perform craft work, is denied, except that until March 31, 1965, Defendant may man the positions of one Train Dispatcher and two Rate and Division Clerks with supervisory personnel, and that Defendant may thereafter continue this practice only upon a showing of reasonable necessity.

3. Defendant's request that it shall not be deemed in violation of any existing collective bargaining agreement by exceeding the apprentice and/or trainee ratios or maximum age limitations contained in any such agreement, is granted.

4. Defendant's request that it shall not be deemed in violation of any existing collective bargaining agreement by permitting or requiring non-exempt foremen to perform scope work of the craft they supervise, is denied.

5. Defendant's request that it shall not be deemed in violation of any existing agreement, by virtue of the contracting out of work which it does not have personnel available to perform, is denied except that it may continue to contract out work in areas where it is presently doing so, as shown in this record, to-wit: the performance of the work of one Bridge Maintenance and Repair Gang and installation and maintenance of the Centralized Traffic Control System.

6. Defendant's request to perform the work of
386 Bridge Tender by supervisory or contract employees during the continuance of the strike, is denied except that Defendant may continue to use supervisory or contract employees in the position of Bridge Tender until March 31, 1965.

7. Defendant's request that its obligation to furnish seniority rosters be conditioned upon an Order subjecting the General Chairman, or other designated official requesting such lists, to sanctions for contempt in the event of their misuse, is denied.

8. Defendant's request that the union shop provisions of each collective bargaining agreement be declared void and unenforceable as to new employees hired since January 23, 1963, is denied; and it is

FURTHER ORDERED that Defendant shall have to and including December 10, 1964, in which to bring itself into full compliance with this Court's Preliminary Injunction of October 30, 1964, and this Order.

DONE AND ORDERED at Jacksonville, Florida, this 3rd day of December, 1964.

BRYAN SIMPSON
Chief Judge
United States District Court

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387 Filed Dec. 4, 1964

Notice of Appeal to Court of Appeals Under Rule 73(b). 28 U.S.C. § 1291, 1292, 1651, and 29 U.S.C. § 110

NOTICE IS HEREBY GIVEN that Florida East Coast Railway Company, defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order entered in this action on October 30, 1964, granting a preliminary injunction against defendant, and

from the Order entered on December 3, 1964, denying Approval of Employment Practices, application for which was made by defendant pursuant to Paragraph 1(e) of the Preliminary Injunction entered herein on October 30, 1964.

WILLIAM B. DEVANEY
William B. Devaney
1100 Shoreham Building
Washington, D. C. 20005

J. TURNER BUTLER
J. Turner Butler
814 Florida Title Building
Jacksonville, Florida 32202

Attorneys for Defendant

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389 Filed Dec. 4, 1964

Designation of Record for Preliminary Hearing in the Court of Appeals

Defendant, Florida East Coast Railway Company, is filing a Motion for Stay pending appeal of the Order of the Court entered on December 3, 1964, denying approval of employment practices. Pursant to Rule 23(4) of the Rules of the United States Court of Appeals for the Fifth Circuit, defendant requests that the Clerk transmit to the Clerk of the Court of Appeals the following original papers:

1. Findings of Fact and conclusions of law entered on October 30, 1964.

2. Preliminary Injunction entered on October 30, 1964,

3. Application of Defendant for approval of Employment Practices.

4. Motion for Stay of Portion of Order with attached affidavits of W. L. Thornton, President; Raymond W. Wyckoff, Vice President and Director of Personnel; H. E.

Hales, General Superintendent Motive Power; and H. E. Webb, Superintendent Communications and Signals.

5. Notice of Hearing on Motion for Stay at 9:30 A.M., November 13, 1964.

390 6. Telegraphic notice of change of time for hearing on Motion to Stay from 9:30 A.M. to 12 noon, November 13, 1964.

7. Order entered November 12, 1964 granting Stay of Portion of Order of October 30, 1964, pending hearing on Defendant's Application for Approval of Employment Practices, cancelling hearing on Notice of Motion for Stay, and setting hearing on Application for November 20, 1964 at 2:00 P.M.

8. Order entered on November 19, 1964, resetting hearing on Application for 9:30 A.M., November 30, 1964, and continuing stay previously entered.

9. Defendant's Exhibits W through OO.

10. Transcript of Hearing of May 26-28, 1964.

11. Transcript of such portion of the Hearing of November 30, December 1, and 2, 1964, as the Reporter can make available for this Motion (the Reporter has indicated that he can transcribe only Mr. Thornton's testimony and the argument of Counsel).

12. Order entered December 3, 1964, denying Application for Approval of Employment Practices.

13. Docket entries.

14. This disignation of Record for Preliminary Hearing.

WILLIAM B. DEVANEY
William B. Devaney
Attorney for Defendant

391 Filed Dec. 7, 1964

Bond On Appeal

KNOW ALL MEN BY THESE PRESENTS That we, Florida East Coast Railway Company, a corporation, as principal, and United States Fidelity & Guaranty Company, a corporation, as surety, are held and firmly bound unto the United States of America in the sum of Two HUNDRED FIFTY ($250.00) DOLLARS to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

SEALED with our seals and dated this 7th day of December, 1964.

WHEREAS, on October 30, 1964, an Order was entered in the above styled action granting a preliminary injunction against the said Florida East Coast Railway Company and on December 3, 1964, an Order was entered in the above styled action denying Approval of Employment Practices, application for which was made by defendant pursuant to Paragraph 1 (e) of the Preliminary Injunction entered on October 30, 1964;

WHEREAS, the said Florida East Coast Railway Company has duly filed a Notice of Appeal from said Orders of October 30, 1964, and of December 3, 1964, to the United States Court of Appeals for the Fifth Circuit,

NOW, THEREFORE, the condition of this bond is
392 such that if the said Florida East Coast Railway Company shall pay all costs if the appeal is dismissed or the orders affirmed, or such costs as the appellate court may award if the orders are modified, then this

obligation to be void, otherwise, to remain in full force and effect.

FLORIDA EAST COAST RAILWAY COMPANY
By R. W. WYCKOFF
Its Vice President and
Director of Personnel

Principal

UNITED STATES FIDELITY & GUARANTY COMPANY
By RAYMOND C. WINSTEAD
Its Attorney-in-Fact

Surety

---

393 (Certified Copy)

General Power of Attorney

No. 65951

Know all Men by these Presents:

That United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and having its principal office at the City of Baltimore, in the State of Maryland, does hereby constitute and appoint Cooper M. Cubbedge and Raymond C. Winstead of the City of Jacksonville, State of Florida its true and lawful attorneys in and for the State of Florida for the following purposes, to wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and perform any and all acts and things set forth in the resolution of the Board of Directors of the said United States Fidelity and Guaranty Company, a certified copy of which is hereto annexed and made a part of this Power of At-

torney; and the said United States Fidelty and Guaranty Company, through us, its Board of Directors, hereby ratifies and confirms all and whatsoever either the said Cooper M. Cubbedge or the said Raymond C. Winstead may lawfully do in the premises by virtue of these presents.

In Witness Whereof, the said United States Fidelity and Guaranty Company has caused this instrument to be sealed with its corporate seal duly attested by the signatures of its Vice-President and Assistant Secretary, this 16th day of May, A. D., 1952.

UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Signed) By J. D. WILLIAMS
Vice-President

(SEAL)

(Signed) WILLIAM J. McFEELY
Assistant Secretary

STATE OF MARYLAND }
BALTIMORE CITY } ss:

On this 16th day of May, A. D., 1952, before me personally came J. D. Williams, Vice-President of the United States Fidelity and Guaranty Company and William J. McFeely, Assistant Secretary of said Company, with both of whom I am personally acquainted, who being by me severally duly sworn, said that they reside in the City of Baltimore, Maryland; that they said J. D. Williams and William J. McFeely were respectively the Vice-President and Assistant Secretary of the said United States Fidelity and Guaranty Company, the corporation described in and which executed the foregoing Power of Attorney; that they each knew the seal of said corporation; that the seal affixed to said Power of Attorney was such corporate seal, that it was so affixed by order of the Board of Directors of said corporation, and that they signed their names thereto by

like order as Vice-President and Assistant Secretary, respectively, of the Company.

My commission expires the first Monday in May, A. D., 1953.

(SEAL)

(Signed) M. G. LEE

Notary Public.

STATE OF MARYLAND }
BALTIMORE CITY } ss:

I M. Luther Pittman, Clerk of the Superior Court of Baltimore City, which Court is a Court of Record, and has a seal, do hereby certify that M. G. Lee, Esquire, before whom the annexed affidavits were made, and who has thereto subscribed his name, was at the time of so doing a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments, or proof of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

In Testimony Whereof, I hereto set may hand and affix the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 16th day of May, A.D., 1952.

(SEAL)

(Signed) M. LUTHER PITTMAN
Clerk of the Superior Court of Baltimore City

That Whereas, it is necessary for the effectual transaction of business that this Company appoint agents and attorneys with power and authority to act for it and in its name in States other than Maryland and in the Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland

Therefore, be it Resolved, that this Company do, and it hereby does, authorize and empower its President or either of its Vice-Presidents in conjunction with its Secretary or one of its Assistant Secretaries, under its corporate seal, to appoint any person or persons as attorney or attorneys-in-fact, or agent or agents of said Company, in its name and as its act, to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performances of contracts other than insurance policies and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings, or by law allowed, and

Also, in its name and as its attorney or attorneys-in-fact, or agent or agents to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or anything in the nature of either of the same, which are or may by law, municipal or otherwise, or by any Statute of the United States or of any State of Territory of the United States or of the Provinces of the Dominion of Canada or of the Colony of Newfoundland, or by the rules, regulations, orders, customs, practice or discretion of any board, body, organization, office or officer, local, municipal or otherwise, be allowed, required or permitted to be executed, made, taken, given, tendered, accepted, filed or recorded for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality or other association or organization

whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or any conditions which may be provided for in any such bond, recognizance, obligation, stipulation, or undertaking, or anything in the nature of either of the same.

I, H. G. Sachse an Assistant Secretary of the United States Fidelity and Guaranty Company, do hereby certify that the foregoing is a full, true and correct copy of the original power of attorney given by said Company to Cooper M. Cubbedge and Raymond C. Winstead of Jacksonville, Florida, authorizing and empowering them to sign bonds as therein set forth, which power of attorney has never been revoked and is still in full force and effect.

And I do further certify that said Power of Attorney was given in pursuance of a resolution adopted at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company in the City of Baltimore, on the 11th day of July 1910, at which meeting a quorum of the Board of Directors was present, and that the foregoing is a true and correct copy of said resolution, and the whole thereof as recorded in the minutes of said meeting.

In Testimony Whereof, I have hereunto set my hand and the seal of the United States Fidelity and Guaranty Company on (Date) 4th December, 1964.

H. G. Sachse
Assistant Secretary

395 Filed December 30, 1964

Notice of Appeal to Court of Appeals Under Rule 73(b)

NOTICE IS HEREBY GIVEN that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order of the United States District Court for the Middle District of Florida (dated October 30, 1964) granting a preliminary injunction against the defendant and the Order of the United States District Court for the Middle District of Florida (dated December 3, 1964) with respect to the application of defendant for approval of employment practices.

EDWARD F. BOARDMAN
United States Attorney

By WILLIAM J. HAMILTON, JR.
William J. Hamilton, Jr.
Assistant United States Attorney
407 Post Office Bldg.
(P. O. Box 59)
Jacksonville, Florida 32201

Attorneys for Plaintiff

1 IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 64-107-Civil-J

UNITED STATES OF AMERICA

v.

FLORIDA EAST COAST RAILWAY COMPANY

Transcript of Proceedings

Before the HONORABLE BRYAN SIMPSON,
Judge of the above Court,

Commencing at 9:40 o'clock a.m.,
on Tuesday, May 26, 1964

JOSEPH A. SHERIDAN,
Official Reporter.

2 **Appearances**

For the Plaintiff:

Howard E. Shapiro, Esquire
Department of Justice,
Civil Division,
Washington, D. C.

Peter B. Edelman, Esquire
Department of Justice,
Civil Division
Washington, D. C.

William J. Hamilton, Jr., Esquire
Assistant United States Attorney
Jacksonville, Florida

For the Defendants:

Messrs. Steptoe & Johnson
1100 Shoreham Building
Washington 5, D. C.
By: William B. Devaney, Esquire

J. Turner Butler, Esquire
814 Florida Title Building
Jacksonville, Florida

For the Intervenors:

Messrs. Milledge, Rutledge, Milledge & Simon
601 Flagler Federal Building
Miami, Florida

By: Neal Rutledge, Esquire
and
Allan Milledge, Esquire

3 INDEX OF WITNESSES

For Plaintiff:	Direct	Cross	Redirect	Recross
Wyckoff, Raymond W.	76-209	212-226	227-229; 231-250	
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For Defense:				
DuPont, C. A.	377-409			
McDougall, R. W.	413-418			
Howard, W. F.	420-438			
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5 The Court: Good morning, Gentlemen.

This is No. 64-107, United States against F.E.C. Railway Company, Application for Preliminary Injunction.

Are any additional appearances to be noted?

Mr. Hamilton: Yes, Your Honor.

For the United States, in addition to Mr. Shapiro, I believe Your Honor has previously met Mr. Peter B. Edelman, also from the Civil Division.

The Court: Mr. Edelman?

Mr. Edelman: Yes, Sir.

The Court: You are from the Department of Justice?

Mr. Edelman: Yes, sir.

The Court: From the Civil Division?

Mr. Edelman: Yes, sir.

6 The Court: Mr. Milledge, you have a—

Mr. Milledge: Yes, sir.

The Court: —Petition to Intervene here?

Mr. Milledge: We do, on behalf of eleven of the non-operating brotherhoods.

The Court: Are there any other Petitions to Intervene?

Mr. Devaney and Mr. Butler are here on behalf of the defendant Railway Company.

Mr. Devaney: That's correct, Your Honor.

The Court: These gentlemen, are they—

Mr. Milledge: They are—

The Court: —can we classify them in general as Union Chairmen?

Mr. Milledge: And Union officials.

7 The Court: And Union officials. Are they—

Mr. Milledge: Many of them are under subpoena, Your Honor, by—

The Court: There's a big batch of subpoenas duces tecum filed here.

Mr. Milledge: Many of them are here in response to those subpoenas.

The Court: I suppose we might take up the question of the Petition in Intervention first.

You might make what statements you would like to make, Mr. Milledge.

Mr. Milledge: Your Honor, the Complaint filed by the United States of America is somewhat similar to the Complaint which was filed on behalf of the Brotherhood of Railroad Trainmen. Many of the issues are the same.

The intervenors here, or applicants to intervene, are the eleven so-called cooperating non-operating
8 brotherhoods. They are the eleven brotherhoods who are on strike.

The strike that was called on January 23, 1963, was called by these eleven non-operating brotherhoods who here seek to intervene.

The purpose of the lawsuit brought by the Government is to vindicate the processes of the Railway Labor Act as it applies to the rules, rates of pay and working conditions of the various non-operating crafts.

We feel that the non-operating crafts have a vital, direct interest; that whatever ruling is made here, even if it were not a res adjudicata matter, that is, if we were not parties, it might not be res adjudicata but the effect will be just the same and we have submitted to Your Honor a memorandum which I believe you have received, have you not, sir?

The Court: Yes, sir. It was received in my office on the 22nd.

Mr. Milledge: The Motion to Intervene is filed under Rule 24(a)(2). There is no statute giving a right to
9 intervene here but we feel that we do have, at least under the more recent cases, a right to intervene because there is the possibility that the Government's representation here may be different than the representation by the people directly concerned. And as we set forth in our memorandum, the Government's position is the public interest, where our interest here is a more direct, economic interest and it is possible, as happened in the

Brotherhood of Raiload Trainmen issue, that the Government's position was only a part of the issues.

Now there, they weren't a party but they did file an amicus brief before the Court of Appeals and they—

The Court: That was argued yesterday afternoon, wasn't it?

Mr. Milledge: It was, Your Honor.

The Court: Was the Government permitted to argue in that case?

Mr. Milledge: I don't believe they requested—
10 in any event, they did not orally argue.

The Court: They asked leave to file a brief.

Mr. Milledge: Yes, sir, and that was granted.

But there, they supported two of the issues but took no position on the third, so there is that possibility here also.

The more recent decisions, and there are three of them cited, in which the District Judge decided not to permit intervention; and in the three cases we cite, all within the past ten years, the District Judge was reversed, not because the applicants to intervene would be bound under res adjudicata principles but because they had such a direct economic interest in the outcome and were so directly affected that the Courts in all three cases decided that the practical necessities were such that the applicants should have been permitted to intervene.

Two of the cases cited involved unions and the third involved property rights.

Of course, there is an alternate ground for intervention and that is the Court's discretion under Rule 24(b).
11 Certainly what has been raised in our intervenors' complaint raises the same questions of fact and law as the Government's complaint; so clearly it is within your discretion to permit us to intervene, but we urge that because of the practical necessities involved that we should be granted a right to intervene under Rule 24(a)(2).

Now, just in connection with this generally, as Your Honor has already noted, there are—I'm not sure how many, but there are twenty or more—subpoenaes duces tecum outstanding to various people that we represent. And I think that's an additional reason why we ought to be parties here and given that standing, as Your Honor can see by the vastness of what is requested under these subpoenaes, there's going to be quite a bit of difficulty and it might be resolved more easily if we were a party and had the opportunity to object as to materiality rather than to have to have a long argument on a Motion to Quash because of the general fishing nature of these, or the privileged nature of much of what's requested. We might have to argue it on a different basis and it might be more expeditious if we were a party and could present the
12 matter in terms of materiality rather than in terms of either the impossibility of production or privilege on behalf of these various people, as counsel for witnesses.

We respectfully request that Your Honor permit the eleven cooperating non-operating unions to intervene and to participate in this cause as parties.

The Court: What is the position of the Government, Mr. Shapiro?

Mr. Shapiro: The United States has no objection to the granting of the Motion for Leave to Intervene, Your Honor.

The Court: What is the position of the defendant Railway?

Mr. Devaney: Your Honor, we oppose the Motion to Intervene, not because we question what Mr. Milledge has said as to the parties, the unions he is making this application on behalf of, being the real parties in interest in this action. We agree with him that this is true.
13 The basic reason that we object to this intervention goes to the fact that we believe that the complaint itself is improperly brought by the United States, in part because it is not the real party in interest because

there is no case of controversy and, in due course, this issue will be fully presented to Your Honor.

Now, a Petition to Intervene, whatever the rights of the intervenor, must stand or fall with the main action since it is very clear from this action that it is subsidiary to the principal action.

Now, it is also true that these subpoenas duces tecum have been issued in large part because there was no other way, since the action was brought by the United States to obtain the information necessary for the defense of this action, except by issuing these subpoenas duces tecum.

Now, we believe that the intervention here is actually permissive and not as of right, because nothing that Mr. Milledge has indicated really goes to the question that the representation by the United States is not adequate.

Now, in the absence of adequate representation,
14 then the intervention becomes permissive.

Now, as far as the permissive right and discretionary right to permit them to intervene, we believe that it merely complicates the presentation of the case by having additional examination and cross-examination; and unless and until there is some reason that their interests are not being adequately represented, it seems that the Government can and will, if they have properly brought this action, will properly represent the interests of the unions on whose behalf this action is actually based.

So, for that reason, we do not see any reason to add to the complexity of the action by having additional parties who would have the right to cross-examine, the right to call their witnesses. It would merely add, as Mr. Eardley said in December, it would merely add cross-examination on top of cross-examination.

For these reasons, Your Honor, we oppose the Petition to Intervene.

The Court: Anything further?

Mr. Milledge: I think, as a matter of practicality,
15 they have already by issuing these broad subpoenas

duces tecum, they have effectively made us a party and we're going to have to represent them in one capacity or another here, so that I don't think it's going to complicate this issue at all to have us as parties here. And at the present time, we have no intention of calling any witnesses, but we don't intend to complicate the issues, but do feel that we should be present.

And I think there's one other aspect here, that we've already been through one of these law suits before, and I think Your Honor will recall we did nothing there to drag this matter on or unnecessarily bring on witnesses. It was a short and sweet proposition that went straight to the issues. And that will be the same if we are permitted to intervene today.

The Court: It is my view that these petitioners have a right to intervene under Rule 24(a)(2) on the grounds set out in that portion of the Rule that:

"Representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

It is my further view that if the intervention may not be sustained on that ground, that the permissive intervention under Rule 24(b) should be permitted.

I don't consider that the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. I have the view that this intervention will be of aid to the Court in reaching an orderly and correct decision of the issues involved, rather than detracting from such an effort on the Court's part.

The motion is therefore granted on the provisions of Rule 24(a)(2) and subordinately I express the view that, in any case, it should be granted under Rule 24(b).

Is there some way—I don't know what effort has been made, I know that counsel has been busy with this other case and argument of it before the Court of Appeals yesterday afternoon. I don't know to what extent any agree-

ments have been sought, any stipulations as to facts
17 or any effort to shorten the length of either the oral testimony or the documentary evidence. I would hope that there can be some things accomplished along that line. I'm a little dismayed when I pulled this file the other day and saw all these duces tecum subpoenas.

Mr. Shapiro: Your Honor, last night Mr. Devaney, counsel for the Railroad, and I met briefly. Mr. Devaney served me with a copy of the answer for his client. I think he's going to tender it this morning.

The Court: I don't think that's in the file.

The Clerk: No, sir. It was just handed up this morning, Judge.

The Court: All right. It goes right in here.

The Clerk: Yes, sir. These go in first. (Indicating)

The Court: All right.

Excuse me, Mr. Shapiro.

Mr. Shapiro: I believe that, in going through the
18 answer and the complaint, a great many issues which might be raised have been eliminated and we will be able to proceed quite rapidly on the basis of the facts alleged, facts submitted.

There are cases where F.E.C. has realleged certain matters in terms different than the way the Government has alleged them, but I think we can go through these documents very rapidly and establish the basic outline of the facts without any necessity for further proof.

The Court: All right, sir.

Mr. Devaney: Your Honor, before we reach this, I wonder if it would not be appropriate at this time to consider the Motion to Stay these proceedings, which we had filed previously and had noticed for hearing this morning.

Now, if Your Honor would prefer to go through this, the answer and the simplification or clarification, before considering the motion, I have no objection. I merely suggest that, since this is a preliminary matter, it might properly be considered first.

The Court: This is a Motion to Continue Hearing that you filed on May 11; is that right?

Mr. Devaney: This is—

The Court: At a time when this case was originally set for May 19.

Mr. Devaney: We filed two motions at the time, Your Honor. One was to continue the hearing and the other was a motion to stay the proceedings.

The Court: I would just as soon take that up. I'll take it up now.

Mr. Devaney: The reason for this motion, Your Honor, is that this complaint and the exhibits attached to it indicate quite clearly that the legal issues involved in this case are the same legal issues that were involved in the case that was heard by the Court of Appeals yesterday.

Now, because the issues are the same, even though this action is brought by the United States on behalf of these various unions, we believe that the matter should be held in abeyance until the Court of Appeals decides the case in 21356.

Now, the similarities we've set forth in this motion and some of them, very briefly, are these:

There is a request for an injunction to restrain defendant from operating during the strike, except in accordance with the agreements in effect before the strike, despite the fact that the strike and the withdrawal of manpower made it impossible for defendant to operate under such agreements during the strike.

Now, this was one of the principal issues involved in 21356 and it is an issue which the Court of Appeals in some manner will have to pass upon.

Now, the complaint in this action further asks for an injunction restraining any action under the Section 6 Notice of July 31st, which was the notice of desire to terminate the union shop agreements.

Now again, Your Honor, that was one of the issues involved in the Civil action 64-40, which is Court of Appeals case No. 21356.

Now, the complaint in this case asks for an in-
21 junction restraining any action under Section 6
Notice of September 24, 1963.

Now, factually this issue was not before the Court in 64-40 because the Brotherhood of Railroad Trainmen had bargained, but the legal issue—that is, the right to put into effect a change in agreement where there is a refusal by the union to bargain—is the same legal issue which was involved in 64-40 with respect to the union shop and, therefore, this legal issue is certain to be affected by the decision in 21356.

Now, this action involves the same basic question of the jurisdiction of the Court. Although other questions are involved additionally, the same basic question of jurisdiction, that is, between the minor and the major dispute argument, is involved in this case as was involved in 64-40. The same question of irreparable harm is involved in this case as was involved in 64-40.

And the same basic question as to the application of the Norris-LaGuardia Act is involved in this case although, again, there are additional variations of it. You have the same problems of conforming to the provisions of
22 the Norris-LaGuardia Act if any relief were to be granted.

Now, this question alone of the application of the Norris-LaGuardia brings to the head the question of irreparable harm.

Now, as Your Honor will recall, on March 14, 1964, in Case 21356, the United States Court of Appeals ordered that the preliminary injunction be stayed, suspended, pending the hearing and determination of the appeal on the merits on May 25th, which was of course yesterday.

Now, because the issues are identical in many respects, we believe that the proceedings should be stayed but, more important, the Court of Appeals specifically found—and if I may, I'll quote their findings in their Order of March 14, in which they said—

The Court: I just wonder. They made a necessary recitation to grant the stay order, but they couldn't have examined this thing in order to enter that order.

Mr. Devaney: In one respect, they did, Your Honor.

The Court: You gentlemen made an emergency
23 application to them and they granted the stay.

Mr. Devaney: That is correct, Your Honor, but the one area and the one issue on which they did make a determination was the question of irreparable harm. And this was their finding and it was after the matter was presented to them on briefs and after full argument before the Court. And they stated in their Order:

"The Court concluding upon consideration of the public interest and a clear showing of irreparable harm that the maintenance of the status quo in the interim will better protect the interests of the respective parties and the general public."

Now, we respectfully submit, Your Honor, that the findings in that case that irreparable harm will be done to the Railroad is applicable to this case. We believe that it's applicable for another reason and that is that the question of the multiplicity of suits was specifically raised before the Court of Appeals and it was the inten-
24 tion, and we believe the clear language of the Order was intended to prevent any further action involving the same legal issues as were involved in that case until they had heard the matter. And in order to expedite the hearing of the matter, it was specially set for hearing on May 25; and the question of deferring action here is not going to be for any extended period of time, since the Court has obviously indicated already that it has expedited the handling of the case.

We believe that it would be improper to proceed at this time with an action that involved the identical legal issues, some of the same factual contentions are present here as were present in 64-40.

We can see no reason why the case should not be stayed.

There can be no irreparable damage to any of the parties. The decision of the Court of Appeals in 21356, whatever it may be, cannot help but have a direct effect on this case because the issues are the same, so that the decision will have a very important impact on what happens in the further handling of this case.

And for this reason, we have suggested that this case, that the hearing in this case be stayed for a reasonable period after the decision of the Court of Appeals.

Now, we have suggested a period of 30 days after the decision of the Court of Appeals in order to give the plaintiff an opportunity to consider whether any amendments of its complaint would be necessary and give us an opportunity to consider whether any change in our presentation would be necessary. But we merely suggest the time. We believe that any reasonable period of time after the decision would be entirely satisfactory, so far as we are concerned.

Thank you, Your Honor.

The Court: I don't care to hear from you.

The Motion to Stay is denied.

This proceeding may take one of several turns, Gentlemen. It may result in a denial of the issuance of preliminary injunction, in which case we would have this behind us. It may result in a decision by me to grant in whole or in part the temporary injunctive relief sought. If that decision is reached, I certainly then can exercise discretion as to whether to have the injunction take effect immediately or delay it until after the action of the Court of Appeals.

The Government has brought this suit. The Government is down here ready to try it. I put them off. They had it set a week ago, I put it off so as to meet the convenience of the parties to let this application be made here today. There are numerous people that are brought here that would be seriously inconvenienced by having to come

here today and then go back and come back at some indefinite time in the future, after the Court of Appeals has disposed of the other case.

All these decisions lead me to conclude that I should go ahead with the hearing, as scheduled.

Now, if you gentlemen can be analyzing the complaint and the answer as you go along, eliminating disputed questions, maybe that would serve to speed up the evidentiary portions of these proceedings, to have a clear understanding of that.

And I'll hear Mr. Shapiro, or hear you gentlemen jointly, or however you think we can best handle this.

Mr. Shapiro: I thought perhaps the simplest way,
27 Your Honor, would be for the United States to make a brief opening statement and then Mr. Devaney and I could go through the answer and the complaint, indicating what's disputed and what's not.

The Court: All right. Proceed with your opening statement, then.

Opening Statement By Mr. Shapiro

Mr. Shapiro: May it please the Court:

This is a suit by the United States to vindicate the policies of the Railway Labor Act, in particular Sections 2, Seventh, and Section 6 of the Act.

The action is not brought on behalf of any labor unions. It's brought on behalf of the United States because of the Government's serious concern over the effect of this extraordinary situation on the Florida East Coast Railroad on the operation of the Act.

Sections 2, Seventh, and 6 of the Act, as Your Honor knows, forbid a carrier from making changes in rates of pay, rules and working conditions, except in compliance with the procedures of the Act.

28 These procedures call for notice of proposed changes, meetings between the parties, and mediation by the National Mediation Board, if the parties cannot

reach agreement through their own efforts or if meetings are refused, and the services of the Board are invoked within ten days after the last unsuccessful conference.

During the period that the Mediation Board is acting, the parties are required to maintain the status quo until the Board determines that its efforts have been unsuccessful and until the Board has exhausted its efforts to induce the parties to accept arbitration.

Now, I think the complaint and answer will show, Your Honor, that the Florida East Coast has been on strike since January, 1963; that it has hired replacements for the strikers and for those of its employees who will not cross the strikers' picket lines. It has, with the replacements, restored about 95% of its freight operation.

Now, it achieved this, the Government alleged in its complaint, by making agreements with its replacements, individual agreements with its replacements, which departed substantially from the collective bargaining agreements which govern its employees, whether they are replacements or whether they are strikers.

It's the Government's position that the collective bargaining agreements remain in force for all classes or crafts until they are changed in accordance with the procedures of the Act. For example, the strike involving the non-operating organizations is over a notice by the carrier to reduce wages about 20%, and there's no question but that the carrier can act under its notice because all of the procedures of the Act have been exhausted with respect to that strike.

But the carrier here has gone on from there and has made three changes that we are concerned with:

First, it purported to put into effect a set of "Conditions of Employment" which were promulgated formally on September 1st, 1963, without any notice to the labor organizations involved and without any attempt to comply with the provisions of the Railway Labor Act.

Now, I understand from the answer and from the argu-

ment of counsel in the Court of Appeals that, at the present time, the "Conditions of Employment" are not in
30 effect, that they have been superseded in effect by a document entitled "Uniform Working Agreement", which was proposed by this carrier on September 24th, 1963, and served upon 17 labor organizations representing non-operating employees. These organizations include the 11 non-operating organizations currently on strike.

Now, the "Uniform Working Agreement" of September 24, 1963, appears to be substantially the same as the "Conditions of Employment" which the carrier purported to be operating under after September 1st. So that what the carrier did was to take its "Conditions of Employment" of September 1, revised it slightly and turn it into a formal notice under Section 6, which it served.

The dispute over this September 24th "Uniform Working Agreement" was the subject of a timely invocation of the Mediation Board's services and it was docketed by the Board of October 31st, 1963. However, notwithstanding this, on October 30th, 1963, the carrier purported to put the "Uniform Working Agreement" into effect for its non-operating employees, including the International Association of Railway Employees.

31 I might say that we use this term "non-operating employees", I don't want to prejudice the rights of the International Association of Railway Employees, which I understand has a dispute with the carrier as to whether it's an operating or non-operating organization, so while we may occasionally use this term carelessly, that reservation should be made.

Now, when the Mediation Board received the application, it advised the carrier that it had received it and the F.E.C. told the Board that the unions were not in position to avail themselves of the Mediation Board's services because they had, as they say, refused—as the carrier had refused to bargain. This was a dispute over whether a Court Re-

porter should be present at a conference. The labor organizations did not want to bargain in the presence of the Court Reporter and the carrier did not want to bargain in the absence of a Court Reporter, so the negotiations broke down and the Mediation Board's services were invoked.

It has been the carrier's position from the very beginning of this invocation of the Mediation Board's services that the Mediation Board docketing was of no effect,
32 that the Mediation Board has no jurisdiction, that the carrier was free to resort to self-help without further regard for the provisions of Section 6 of the Railway Labor Act, which require that the status quo be maintained while the case is docketed with the Mediation Board.

Finally, the carrier has purported to abrogate unilaterally the union shop agreements of 18 organizations. Part of this matter was involved in the BRT case, since the BRT had a union shop agreement. There were 17 other organizations which are parties to a union shop agreement with the carrier.

On July 31st, 1963, the carrier proposed to cancel the agreements by notice, which it served on the organizations. The parties met; they conferred on, I believe, August 29th, 1963. The conference broke down over the Court Reporter issue once more and the carrier, nevertheless, reported to abrogate the agreements on September 9, 1963, although the Mediation Board's services had been invoked with ten days after that conference broke down. The Mediation Board formally docketed the case on October 11.

The carrier advised the Mediation Board that it
33 did not consider the labor organizations to be in a position to invoke the Board's services, and again indicated that the Board was without jurisdiction.

I might state, Your Honor, that since this has happened, the Mediation Board has not undertaken mediation. Its jurisdiction was contested by the carrier. The carrier put the changes involved into effect and the Mediation Board

has not mediated on the August 24—I'm sorry, on the September 24 "Uniform Working Agreement", nor has it done so with respect to the union shop abrogation, with one exception; I believe the International Association of Railway Employees was a party to the original docketing of the September 24th notice which the IARE subsequently requested that it be eliminated from that docketing.

The carrier states in its answer that it has not but the "Uniform Working Agreement" into effect for the IARE. And the Mediation Board did send a Mediator down to mediate on that dispute in March of this year. It has been a dispute between the carrier and the Board since that time over how the mediation is being conducted. And that, however, I don't believe to be relevant to this suit.

34 Now, the actions by the carrier are violations of the Act's requirements in the following respects:

First, insofar as the "Uniform Working Agreement" of September 24, 1963, which is a permanent statement of the temporary conditions of September 1, 1963, is concerned the carrier has violated the Act by putting that into effect notwithstanding the fact that the services of the Mediation Board have been invoked. This violates Sections 2, Seventh, and 6 of the Act. And we also believe it violates the carrier's duties to bargain under Section 2, First and Second, of the Act; since, by avoiding the requirements of the Act, it makes a prima facie case of failing to bargain as the Act contemplates.

Similarly, the abrogation of the union shop agreement on September 9th, 1963, after a timely invocation of the services of the Mediation Board, constitutes a violation of Sections 2, Seventh, and 6, and Section 2, First and Second.

Now, when we drew this complaint, Your Honor, I was uncertain from the information available to me whether the "Conditions of Employment" of September 1, 1963, which are supposed to be temporary conditions the car-

rier has put into effect because of the strike emer-
35 gency, were still in effect or not. It seems to be clear from the answer that the conditions of September 24, 1963, the "Uniform Working Agreement", are now the conditions under which this carrier is operating and it is not operating under the "Conditions of Employment".

It also appears to be clear that, as far as the operating organizations are concerned, the carrier is not operating under the "Conditions of Employment" of September 1, 1963, but is now operating under the collective bargaining agreements which were in force prior to the time the strike began, as amended by certain notices served on November 2nd, 1959, in the national railway dispute. So that the carrier is not operating under these temporary "Conditions of Employment" at all.

Our concern with the temporary "Conditions of Employment" therefore is not so much that it is currently operating them, but that if it were enjoined from continuing the "Uniform Working Agreement" of September 24, that it would revert to these "Conditions of Employment" which contain substantially the same thing, and then say that these are only temporary because of the strike.
36 Now, I think that Mr. Devaney and I could turn to the answer and the complaint and trace for the record the substantial history of this dispute.

I would also refer to the affidavit of Eugene C. Thompson, which is in the record.

The Court: Where is that in the record?

Mr. Shapiro: That is attached to the—

The Court: Attached to the Motion for Preliminary Injunction?

Mr. Shapiro: Attached to the Motion for Preliminary Injunction.

Now, Mr. Thompson's affidavit is intended simply to present to the Court the documents from the records of the Mediation Board which reflect the history of the notices

of these several disputes, of the docketings of these several disputes, of the carrier's objections to the docketings and of the carrier's implementation of the several notices that it proposed. I don't think there is any substantial
37 dispute as to the contents of that affidavit.

There is one matter I would like to clear up which we weren't able to do when we drew the affidavit. That is the matter of a date.

As we go through the answer—as we go through the complaint and answer, I think, by referring to the documents in the affidavit, we can trace substantially the history of the dispute for the purposes of the record and tell a comprehensive story which will eliminate the necessity for most of the proof which we might otherwise have had to put on.

Perhaps Mr. Devaney and I can begin then and go along step by step.

The answer, turning to the complaint, it's admitted, of course, that the carrier is a corporation, that it is covered by the Railway Labor Act, that since January, 1963, the 11 labor organizations have been on strike.

I think it's admitted that, on September 24, 1963, F.E.C. served a notice, a Section 6 notice, on 17 labor organizations. Now, that Section 6 notice, Your Honor, appears in Mr. Thompson's affidavit as Exhibit 12. Actually,
38 it's an attachment to Exhibit No. 12 of Mr. Thompson's affidavit. And there you will find the "Uniform Working Agreement" which the carrier proposes between the Florida East Coast Railway Company and the employees represented by the Brotherhood of Railway and Steamship Clerks.

There is a correction apparently indicated in the answer concerning the organizations to which this was sent. One of the organizations listed, United Transport Services employees, has two divisions, one for redcaps and one for train porters.

Now, it's admitted that on—

The Court: The answer says it was not served on System Federation No. 69, of the Railway Employees Department, AFL-CIO.

Mr. Shapiro: Yes, Your Honor.

The Court: That organization apparently is listed as one of the organizations served.

Mr. Shapiro: Yes, Your Honor. The reason for that is that the System Federation No. 69, of the Rail-
39 way Employees Department, as I understand it, is actually made up of the five or six shop craft organizations, as they are called. These include the—my recollection may be a little foggy, but, glancing at the listing, it includes the International Association of Machinists; the Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Sheet Metal Workers International Association; the International Brotherhood of Electrical Workers; the Brotherhood of Railway Carmen; the International Brotherhood of Firemen and Oilers. So these are listed, these organizations are listed in that "Uniform Working Agreement" and they have a consolidated—or they had a consolidated collective bargaining agreement which was listed under System Federation No. 69, of the Railway Employees Department, AFL-CIO. And under that, the five or six component organizations.

Well now, after they served this notice on September 24, 1963, the answer admits that the carrier's representatives met with representatives of the labor organizations for the purpose of discussing the carrier's Section 6 notice of September 24. There is there a recital in the answer.
40 It's admitted that the conference broke down over the matter of a Court Reporter.

The Court: Well, he doesn't seem to admit that. I'm looking at paragraph 6 of his answer. He says that:

"The representatives of all 17 labor organizations refused to bargain and no conference on defendant's proposed Section 6 notice ever commenced."

Mr. Shapiro: Well, at least—

The Court: Then he admits that they objected to the presence of the Court Reporter.

Mr. Shapiro: Well, let us say that the parties came face-to-face and they talked about talking and they broke away from each other. I think, for the purposes of our Motion for Preliminary Injunction, that much is clear.

Now, as the answer says, the International Association of Railway Employees later bargained on this issue.

Now, on October 23, 1963, this was five days
41 after the conference broke down, a letter was sent to the Mediation Board, which it received on October 28, 1963, as is accurately stated in the answer and I think is inaccurately stated in the complaint. The carrier was notified by the Mediation Board of the receipt of the application, and that notification appears attached to Mr. Thompson's affidavit as Exhibit 11.

When the Board received the application, it wired the Railroad. Actually, the Board was first notified that a telegram had been sent, invoking the Board's services. The Board immediately notified the carrier and the carrier wired back its position concerning the right of these organizations to invoke the Board's services. That position is stated in Exhibit 13 to Mr. Thompson's affidavit. What the carrier said was that:

"It is Railway's position that no provision of that Act prohibits presence of Court Reporter".

This is Exhibit 13:

"Consequently, organizations failed to fulfill their obligation to negotiate on Railway's notice and are
42 not now in position to avail themselves of services of the Mediation Board, Railway enjoying right to place proposed rules into effect ten days from termination of conference by employees on October 18, 1963."

So there was a very plain statement of where the carrier stood.

Later, the Mediation Board received from the carrier a copy of a letter it was sending to the organizations. This appears as Exhibit 14 to the Thompson affidavit, which advises of the history of the negotiation, or the break-down of the negotiation, and then stated that:

"In view of the circumstances, pursuant to the provisions of Section 6 of the Railway Labor Act, as amended, this will constitute notice of the Railway placing in effect, as of this date, the proposed Agreement appended to its Notice to you of September 24, 1963."

So, by letter of October 30, 1963, Florida East Coast put into effect the "Uniform Working Agreement" that it had proposed on September 24 and it did this notwithstanding the fact that the services of the
43 Mediation Board had been timely invoked.

Now, the Mediation Board docketed the dispute and sent the carrier a letter stating that it had docketed the dispute, which I believe is a telegram they sent to them dated October 31, 1963. That's Exhibit 16 to the—

The Court: 15.

Mr. Shapiro: —15 to the affidavit.

And the Board concluded that telegram with these words:

"The attention of all concerned is called to provisions of Section 6 of the Act."

I might say that the Mediation Board is not an enforcement agency and it's only a mediation agency and they would not go much further than to docket the dispute, as their function requires, and call the attention of the parties to the law.

Whether anything can be done about this or not on behalf of the United States is a matter that the Department of Justice had to undertake to study. That is why we
44 are here, because the carrier did, in our judgment, violate Section 6.

Now, those are the operative facts, as far as the September 24, 1963 Notice is concerned, as we see the case.

We can proceed to the union shop dispute, which really is Count II of the complaint. This involves a similar history, again demonstrated in the affidavit.

This time, the union shop dispute began on July 31st, 1963. The affidavit of Mr. Thompson and I believe the answer both recite the relevant history of this adequately. On July 31st, they served a notice. On August 29, they met. They disputed over the Court Reporter.

Now, the complaint states that on September 6, 1963:

"The National Mediation Board received an application on behalf of 17 of the 18 labor organizations."

Mr. Thompson's affidavit, I don't believe accurately enough showed the date on which that application was received. We have available a certified copy of the original letter from the Order of Railway Telegraphers, transmitting the application invoking the Mediation Board's services. This is not part of Mr. Thompson's affidavit. (Tendering instrument to Mr. Devaney and Mr. Milledge)

This letter bears the date stamp of September 6, 3:15 p.m., National Mediation Board. It also bears a signed statement that this is an official record of the United States Government and a document kept in the office of the National Mediation Board, certified a true copy.

We would like to offer this to the Court under Rule 44 as a Government record.

Mr. Devaney: Your Honor, I object, for this reason:

When Mr. Thompson gave his affidavit, this was—that is, the letter with a date stamp is not made a part of his affidavit. We took the deposition of Mr. Thompson. At that time, he had no knowledge. This was not—he did not have this with him. There has been no opportunity to question him about it, and because his affidavit was taken, I object to the introduction of it in this manner without an opportunity to further examine Mr. Thompson

concerning this. It's not a question of the matter
46 that is originally submitted by an official under the idea that the shop book rule covers it. This was not part of his original affidavit. His deposition was taken. It was not made a part of it then, and I think, if it's to be introduced at this time with the date stamp on it, we are entitled to have the opportunity to further examine Mr. Thompson.

Mr. Shapiro: In answer to that, I have Mr. Thompson's deposition, Your Honor. I think it has been sent to the Court. Mr. Thompson was—

The Court: The defendant Railway took Mr. Thompson's deposition?

Mr. Shapiro: Yes, sir.

The Court: At some point in time between the filing of the complaint in this case; is that correct?

Mr. Shapiro: Yes, Your Honor. Mr. Thompson's deposition was taken on Wednesday, May 20, 1964.

The Court: Yes, sir.

47 Mr. Shapiro: And Mr. Devaney had the opportunity to question Mr. Thompson about these date stamps. He did question him, as I recall—

The Court: Was this letter identified by Mr. Thompson at the deposition hearing?

Mr. Shapiro: No, Your Honor. The deposition subpoena was not duces tecum and so he brought no documents with him.

In the course of Mr. Devaney's questioning of Mr. Thompson, I realized he was concerned that we didn't have the original letter, transmitting the "Uniform Working Agreement" application for mediation in the affidavit, and also that one of the letters we did have in the affidavit did not bear the date stamp.

Mr. Thompson was questioned why that letter didn't bear the date stamp and he said the reason was, when they made the copies, somebody pulled the carbon instead of the original letter. It was that simple an explanation.

When I realized this was a subject of concern
48 here, I asked Mr. Thompson to obtain for me a certified copy of the document.

This is a letter written to the Mediation Board by the Order of Railroad Telegraphers. It's a certified copy, simply shows the date stamp and shows that the document was received on September 6, 1963.

I don't believe the matter is of any great concern in any event because—

The Court: Well—

Mr. Shapiro: —the conference broke down on August 29, 1963. As of September 9, 1963, the Railroad was formally notified by a letter from the Mediation Board that its services had been applied for. So that at least by September 9, which would have been the tenth day after the conference broke down, the services of the Board were invoked.

I offer this simply to clarify the record so that it will show accurately that this particular letter was received on September 6. I don't believe that Mr. Thompson could give any other testimony but that the date stamp
49 is there on the letter; that that was the day it must have been received in due course.

It was testified in the deposition proceeding that a letter, or that correspondence received by the Board is in the normal course date stamped in the manner that's shown on the letter I'm about to offer, and indeed, in the manner that's shown on most of the items that are attached to the affidavit. Mr. Devaney had the opportunity to examine on how these date stamps are put on the letters and how the documents are processed in the files of the Board. He was given an opportunity to question Mr. Thompson as to why a couple of documents didn't have the date stamp.

The explanation was given as to why some didn't, because someone had pulled the carbon copy.

Mr. Devaney did not—let's see, I'm trying to recall accurately the deposition which we received only this

morning but, as I recall it, Mr. Thompson was questioned as to why the date stamp did not appear. Let's see, he was questioned as to why the date stamp did not appear on the application of the Mediation Board—application to the Mediation Board that was attached to one of the documents in the file, and it was explained
50 that the date stamp would appear not on the application but on the letter of transmittal. Now, all this is is a letter of transmittal which sent to the Board the application form of Mr. Leighty, invoking the services of the Board on the September 24 Notice. And the application for mediation is attached as Exhibit 5 to the complaint—to the affidavit of Mr. Thompson.

Now, here is the exact scope of the examination. This appears at page 7 of the deposition. Now, the application from Mr. Leighty is Exhibit 5. This is Mr. Devaney:

"I notice that your Exhibit No. 5, Mr. Thompson, which is attached, is an application for mediation from Mr. Leighty.

"Yes, sir.

"Now, I notice that it also does not bear a date stamp. Is there some reason why this document also does not bear a date stamp showing when it was received by the Mediation Board?

"Yes, there is.

"What is the reason on this particular one?

51 "The reason is that the letter transmitting the application bears the date stamp as being the first document in the papers. The date stamp was not applied to the attachments to the letter.

"And you haven't submitted a copy of that letter. So, therefore, you do not show the date stamp?

"Apparently. No, it is not in these exhibits."

Now, it seems to me that there has been an opportunity to examine it. The reason we brought this along was that he indicated he wanted to see it. It is a certified document, so we do tender it.

The Court: It's received in evidence as Plaintiff's Exhibit 1. It is received under the Government Record Statute, 1733 of Title 28, and under Rule 44.

(Thereupon, the referenced document was received and filed in evidence as Plaintiff's Exhibit #1.)

Mr. Shapiro: Well, this established that on September 6, 1963, the services of the Board were invoked on this
52 "Uniform Working Agreement".

Now, we were turning to—I'm sorry, not the "Uniform Working Agreement", but on the union shop agreement. I erred in stating that.

The Court: I see.

Mr. Shapiro: Now, on September 13, 1963, in response to the Board's request to the carrier for its position, since the Board always notifies the carrier when it receives these applications and that request is refused, the carrier responded and it recited the history, as seen by the carrier, of the meetings that had been held. This is Exhibit 7 to Mr. Thompson's affidavit. I think the letter speaks for itself and I won't try to characterize it, but the thrust of it was, as it concludes in the last paragraph that:

"The organizations are not now in position under the Railway Labor Act to request the mediatory services of the National Mediation Board."

Now, this statement is plainly intended to mean that the Mediation Board did not have jurisdiction
53 over the dispute in the carrier's view.

Now thereafter, on September 9, 1963, and this was three days after the services of the Board had been invoked, ten days after the conference had broken down, F.E.C. announced it was putting its union shop proposal into effect and considered the union shop agreements for the 17 organizations involved abrogated. Again, this notification appears in Mr. Thompson's affidavit as part of Exhibit 7. The carrier stated that its notice of July 31st, 1963, had been put into effect as of September 9, 1963.

The Court: That's in the next-to-the-last paragraph?

Mr. Shapiro: Yes, Your Honor.

Now, the Board in the meantime was trying to decide whether to docket the dispute in the light of what the carrier had told it, and they did weigh the argument that had been advanced to it, as Mr. Thompson's affidavit recites, and their conclusion, which is reported by Mr. Thompson, is that they felt that they should docket the dispute. They sent a letter, which is Exhibit 8, to
54 the carrier and to the organization's chairman stating that the application had been docketed. Exhibit 8 also recited, Your Honor, that:

"It is the Board's opinion that the carrier's position that the contracts—"

meaning the union shop contracts—

"are no longer in effect cannot be supported under the above record."

Reciting the various dates involved.

On October 15, 1963, the Florida East Coast wrote back to the Board stating its position that its actions were entirely in accordance with the Act, and taking issue with the Board's determination. Now, that's Exhibit 9 to the complaint.

The Court: Yes, sir.

Mr. Shapiro: To the affidavit, rather.

So that takes us through the August 24 notice and the September 24 notice.

Now, there remains this problem of the "Conditions of Employment" of September 1. As I say, we were uncertain whether they were operating under them or
55 not. And turning to the answer, part of which is concerned with allegations relating to the history of the strike, we find, first, that defendant says with respect to "Conditions of Employment" that its operations under conditions imposed by the strike didn't in any way affect

or change any agreement with any labor organization; that the labor organizations were free at any time to return to work, in which event they would have returned under the terms of their agreement.

It does admit, however, that it had this document entitled "Conditions of Employment", which it proposed on September 1, 1963, and it characterizes this as a written embodiment of rules and practices which the defendant had been compelled by the strike to follow from February 3rd, 1963 in order to provide service to the public.

It admits that these practices were different from the practices in the agreements with the labor organizations. And it states that this is a consequence of the strike.

Then it goes on to state that, on September 24, he gave a Section 6 Notice of intent to place into effect an agreement entitled "Uniform Working Agreement", and refers back to the history of that.

55 Now, I take it that that means that at this moment this carrier is operating not under these "Conditions of Employment" but under the "Uniform Working Agreement".

Mr. Devaney, is that substantially—

Mr. Devaney: I'm sorry—

Mr. Shapiro: That at the present time the carrier is operating not under the temporary conditions of September 1, 1963, as far as the non-operating people are concerned, but under the "Uniform Working Agreement" of September 24, 1963? That's how I understand it.

Mr. Devaney: That's correct.

Mr. Shapiro: That's correct?

Mr. Devaney: Yes.

Mr. Shapiro: So there we have the "Conditions of Employment" out of the picture, so far as the non-operating people are concerned.

56 Now, the "Conditions of Employment" of course apply to both operating and non-operating people, since it's a consolidated document for both classes of employees.

The answer does not refer, as far as I know, to the operating employees but we are concerned with whether the "Conditions of Employment" are applying to the operating employees at the present time or not.

Now I understand, from argument in the Court of Appeals yesterday, that they are not and I would like to ask Mr. Devaney whether the carrier is now operating under the "Conditions of Employment" or whether it is operating under the permanent agreements for the operating organizations, that is, the Brotherhood of Locomotive Engineers, Brotherhood of Firemen or Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brakemen, and the Brotherhood of Railway Trainmen.

Are you operating with respect to those organizations under the "Conditions of Employment" or under the agreements for those organizations, as amended by the November 2nd, 1959, notice?

57 Mr. Devaney: We are working under the prior agreements, as amended by the '59 notice.

Mr. Shapiro: Well then, this establishes, I think, that for the purposes of our Motion for Preliminary Injunction—

The Court: I think this matter, if you will take a suggestion from me—of course, I don't question Mr. Devaney's right to state this matter as counsel, but I would think you ought to call Mr. Wyckoff and ask him this question.

Mr. Shapiro: We do plan to call Mr. Wyckoff and I can present it through Mr. Wyckoff.

The Court: Let's get it there, because this thing is—I heard these cases in December—I heard this trainmen case in March, and here it comes again. It's never quite the same, at least to my recollection, and I would like to get it nailed down for the proceedings.

Mr. Shapiro: Yes, Your Honor, we will develop that matter.

58 Now, does this refer to both the operating and the non-operating organizations? We'll develop it through—

The Court: Well, I think it's perhaps clear about the non-op's.

Mr. Shapiro: We'll develop it through testimony.

The Court: Anyway, you might cover both.

Mr. Shapiro: Well—

The Court: Get a statement from Mr. Wyckoff about it.

Mr. Shapiro: Now, I think that what we've established through the answer and the complaint is the basic history of the notices, the docketing, the conferences, the disputes over the Court Reporter, and the putting into effect of the agreements, of the proposals of September 24, 1963, the "Uniform Working Agreement", and the July 31st, the union shop abrogation.

59 We've also established that as to the non-operating organizations, the carrier is now operating under the "Uniform Working Agreement", not under its temporary "Conditions of Employment". It's yet to be established how the "Conditions of Employment" affect the operating organizations.

And I think that, and Mr. Thompson's affidavit runs through the basic history of the disputes and what it is the Government thinks happened, we now know that most of it did happen as it has been recited.

Now, with that much on the record and recognizing that Mr. Devaney will have factual matters to prove as well as argument today, I would like at this time to proceed to proof by calling Mr. Wyckoff to the stand.

Mr. Devaney: Your Honor, before we do that, as I mentioned earlier, we did have a Motion to Dismiss.

The Court: A little louder; I can't hear you. You have a low and gentle voice, and when you turn your head or back, it's hard for me to hear you and I think the Reporter has difficulty.

60 Mr. Devaney: I mentioned earlier that we intended to present a Motion to Dismiss and I believe that this would be an appropriate time to present the Motion to Dismiss. I did not have it earlier and I apologize for

the lateness, but with this is a Motion to Dismiss the Complaint of the intervenors and, as I mentioned earlier, it's our position that if the main action is dismissed the intervention must also fall, since it's dependent upon the main action. (Tendering instrument to the Court)

The Court: I agree with you.

Mr. Shapiro: May I say one word about—

The Court: If Mr. Shapiro goes out, Mr. Milledge is out, so far as that's concerned.

Mr. Shapiro: One word about hearing the Motion to Dismiss at this time, if I may, Your Honor.

The Court: Yes, sir.

61 Mr. Shapiro: I understand the answer is in.

The Court: It is.

Mr. Shapiro: And of course no Motion to Dismiss was noticed for this day in this proceeding.

Now, most of what's in the Motion to Dismiss, I would guess—I just received it, will relate to matters that would go to the defense against the Motion for Preliminary Injunction. I see that it's addressed, for example, as to whether the Court has jurisdiction; to the effect of the Norris-LaGuardia Act. It may go to the jurisdiction of the Adjustment Board.

Now, these are matters which have already been considdered in the BRT case and they are matters which the carrier can raise in defense to our Motion for Preliminary Injunction on the ground that we have no substantial likelihood of success because of the various jurisdictional defects which it sees in our complaint.

The carrier's answer is in. As I understand it, motions raising lack of jurisdiction over the subject matter
62 must be made before pleading, if a further pleading is permitted, under Rule 12(b).

The Court: Yes, sir. But of course, if I don't have jurisdiction, I would notice it whenever it comes up.

Mr. Shapiro: Yes, Your Honor.

The Court: The only thing I want to do with this motion

is note that it's filed and I'll carry it with the case. I'll consider it with the other motions—with the other questions of law, at the conclusion of whatever evidentiary showing you want to make. I don't care to stop these proceedings at this point and hear further argument on it.

I gather that I'm requested to consider the Wyckoff affidavit and this exhibit, which shows the date stamp on the September 4 letter, the receipt stamp as September 6, I believe; is it?

The Clerk: Yes, sir.

Mr. Shapiro: Yes, Your Honor, as part of our direct.

The Court: As part of your case in chief, yes,
63 sir. And you also intended to call Mr. Wyckoff. Is there anybody else you intend to call?

Mr. Shapiro: Well, we had planned to call Mr. Wyckoff and Mr. Thornton, who is also present in the Courtroom.

The Court: Yes, sir.

Mr. Shapiro: About, first, what is actually happening on the Florida East Coast and, secondly—

The Court: Then that, together with the affidavit—

Is Mr. Thompson—Mr. Thompson is not present, is he?

Mr. Shapiro: Mr. Thompson is not present, Your Honor. As I say, his deposition was taken in Washington.

The Court: I'll take his affidavit and exhibits and anybody can read in portions of his affidavit, either side can read in portions of his affidavit they want to read in.

64 Mr. Shapiro: The deposition, Your Honor?

The Court: The deposition, I mean.

Mr. Shapiro: We are both at a disadvantage on this, Your Honor. I think the deposition transcript became available only this morning. We only received it this morning. I don't know if Mr. Devaney has yet.

Mr. Devaney: No, I have not, Your Honor.

May I, on the record, I take it you meant, on the affidavit, you said Wyckoff, you referred to Mr. Thompson?

The Court: Excuse me. I meant Mr. Thompson; excuse me.

Mr. Devaney: Yes, sir.

The Court: The original, the Clerk's copy of the deposition, is here if either side wants to borrow it. You said you've got your copy, and you haven't got yours?

Mr. Devaney: I wasn't aware it had come in.

65 The Court: You can take the Clerk's copy and either one of you, later in the day, when you decide what part of that deposition you want, it can be put in then.

Mr. Devaney: There is one question with the deposition, Your Honor, and that is that, on most points about which we wished to examine Mr. Thompson, the Government entered the plea of privilege; so that I think, after we have had an opportunity to look at it, there will be some of those questions that we will have no choice but to file an appropriate motion to compel the answer, because it seems that the claim of privilege is both improper and without justification as to the particular matter involved. But we can—I don't have that and I don't know which questions would be in that character.

The Court: I'm sorry you didn't stop the hearing. This was done in Washington last week?

Mr. Devaney: Yes, it was.

The Court: I'm sorry you didn't stop the hearing

66 and go to one of the District Judges in Washington and get an order at that time. It would be, it seems to me, better. But, at any rate, any matters about this deposition that either side wants to put in are certainly deferred until everybody has an opportunity to inspect it. And these questions of privilege lurking around, we'll meet those at that time.

Mr. Devaney: Very good.

The Court: I would like to take about a five-minute rest break before we start with your witnesses. You can be prepared to go ahead in about five minutes.

(Short recess)

The Court: You may proceed, Gentlemen.

Mr. Devaney: You Honor, before Mr. Shapiro begins, I would like to make one request and it is by way of request and as a suggestion.

We have filed various subpoenas duces tecum and I realize that some of the material, they probably would have some dispute as to whether they had it or
67 should produce it, but one of the items that we asked each of these individuals to bring was a Constitution and By-Laws. And what I would like to suggest now is that, if those could be submitted so that we could examine them during the noon recess, I believe it might help speed the process of this hearing rather than waiting and looking at those completely cold when they are submitted as each witness is called.

The Court: This seems reasonable to me. This request seems reasonable.

Mr. Milledge: If we may be heard on this, the Constitution and By-Laws of these organizations don't have the remotest relevance to anything before the Court. These organizations are on strike, that's to be sure, but we respectfully suggest that there must be some showing of materiality or relevancy before they are required to produce this. Perhaps some statement could be made as to what purpose they are desired, but certainly there is no indication of any relevancy at this point. The only issue—excuse me.

68 Mr. Devaney: Your Honor, the relevancy and the reason that we have asked for these primarily is that there is a direct relationship to the union shop question which is one of the Counts of this complaint and one of the defenses to this is the discrimination practiced by the various unions against employees hired since January 23rd. This will be material, we believe, in showing that membership either is or is not available to these new employees, and if any order should be issued, we believe that this knowledge is essential to have on the record in

order that we know what the true facts are concerning the employees who will be directly affected by any decision of this sort.

Mr. Rutledge: Your Honor, may I be heard very briefly on that.

Section 2, Eleventh of the Railway Labor Act sets out what can be a union shop clause and it provides that if membership is not available or, in other words, if what Mr. Devaney proposes to show here is true, that then no person can be required to have his job terminated, if membership is refused for any reason other than tender-
69 ing the regular initiation fee and dues. So that we submit that under Section 2, Eleventh, whatever the Constitution of the organization might provide is irrelevant. If that is a fact, why then the Court in ordering the enforcement of the contract would be ordering simply the enforcement of the provision as required by Section 2, Eleventh of the Railway Labor Act.

Rather than burden this record with the Constitutions of the 11 various unions, which are very voluminous, bulky documents, we submit that it couldn't be possibly be relevant under the applicable law. There's nothing secret about these documents. May I say they are all on file with the Department of Labor, as required by law, so that we are not trying to hide anything by not producing them, but we are concerned with burdening the record with these documents.

The Court: They are not sought to be introduced at this time; simply sought to be produced for examination. Are all the union heads here?

Mr. Rutledge: I believe they are all present in
70 in the Courtroom, Your Honor.

The Court: Can you collect these things up and turn them over to Mr. Devaney at this time, so that—

Mr. Rutledge: We can start assembling them, yes.

The Court: All right. I'm not prepared to say whether they will be relevant or material at some later point or not,

but he has subpoenaed them and I think he has made a sufficient showing of necessity to examine them.

Mr. Rutledge: May I ask all the various members to produce them?

The Court: Yes, sir. If it will help you, you can take the subpoenas, or I can call them off to you myself.

Mr. Rutledge: I have copies.

The Court: If you have copies of them, call them off and let them produce them. The list of documents attached to each subpoena is a mimeographed list, which I
71 assume is the same as to each of the union heads.

Mr. Rutledge: We have, Your Honor, a motion—

The Court: This is No.—

Mr. Rutledge: This is No. 1.

The Court: No. 1 on each list.

Mr. Rutledge: If we are to get these by the noon recess, I would like to ask the various union people to—it's a physical job of collecting this and bringing it in. And we have a motion which we were going to present to Your Honor concerning these subpoenas at the appropriate time.

The Court: Well, let's just say we've passed—we've decided your motion adversely to you as to this one item.

Mr. Rutledge: I understand.

The Court: All right.

72 Mr. Rutledge: May I ask the indulgence of the Court while—

The Court: Yes, indeed, that's what I had hoped you would do at this time.

Mr. Rutledge: Would you gentlement, each of you who received the subpoenas, meet me outside in the corridor. (Mr. Rutledge and a group of witnesses withdraw from the Courtroom)

Mr. Shapiro: May we proceed Your Honor, or shall we wait for Mr. Rutledge?

The Court: Do you object to going ahead without Mr. Rutledge, Mr. Milledge?

Mr. Milledge: Let me just see how long it will take.

The Court: It shouldn't take very long.

Mr. Milledge: I would respectfully request to wait, if it's only a minute or two.

73 (Short informal recess, after which Mr. Rutledge returned to the Courtroom)

Mr. Rutledge: Your Honor, I have here most of them, I believe, except for the Supervisors'—that's back in the hotel room, I can supply that to you over the lunch hour. Here are substantially all of them. with the exception that on the Signalman there have been some revisions which the Local Chairman does not have here. We can supply that to you out of Chicago but it will have to be sent in by mail.

The Court: Well, you have an earlier copy of the Signalman's?

Mr. Rutledge: Yes, we do, Your Honor.

The Court: I wonder if that won't suffice for these proceedings?

Mr. Devaney: I don't know of any reason why not.

The Court: If for some reason it doesn't, why,
74 let Mr. Rutledge know and let him supply it later.

Mr. Devaney: That's fine.

The Court: But I imagine the provisions that you are concerned with have been embodied in each version of it as it has been amended or revised.

Mr. Devaney: I would assume so.

The Court: I would suppose that.

Mr. Devaney: I would assume that that would be entirely true.

The Court: But at least you can examine this. As I understand it, the only one that is not here is the Supervisors, which you will get to Mr. Devaney during the noon hour.

Mr. Rutledge: I believe that's so. I haven't had a chance to really go through these but any that are missing, we will cetrainly supply you as quickly as we can.

The Court: All right. You will deliver them to
75 him. Thank you very much, Mr. Rutledge.

(Mr. Rutledge tendering instruments to Mr. Devaney)

The Court: All right. Now, may we proceed.

Mr. Rutledge: May I ask one other thing.

Mr. Ricard, who is the Division Chairman of the Telegraphers, has been requested at the Seaboard. And we have here the General Chairman from that Brotherhood and also the Vice President of that Brotherhood. And I'm wondering if he can be released to protect his job with the Seaboard?

Mr. Devaney: Yes, Your Honor, we would—

The Court: If you have somebody else who can give—

Mr. Rutledge: We have the General Chairman and the Vice President, who know everything he does.

The Court: The gentlemen wants to leave, that's the point?

Mr. Rutledge: That's the point.

76 The Court: All right, if you will excuse him, then.

Mr. Rutldege: Thank you, Your Honor.

The Court: All right, sir, who do you want first?

Mr. Shapiro: Call Mr. R. W. Wyckoff.

Raymond W. Wyckoff.

having been produced and first duly sworn as a witness on behalf of the plaintiff, testified as follows:

Mr. Shapiro: Your Honor, we have called Mr. Wyckoff as an adverse witness under Rule 43(b).

The Court: Yes, sir.

Direct Examination

By Mr. Shapiro:

Q. Would you state your name, sir. A. Raymond W. Wyckoff.

The Court: Really, rather than an adverse witness, he is more properly a managing agent of an adverse party.

Mr. Shapiro: Yes, sir.

77 By Mr. Shapiro:

Q. Where are you employed, sir? A. Florida East Coast Railway, St. Augustine.

Q. I see. In what capacity? A. Vice President and Director of Personnel.

Q. What are your duties in that capacity, sir? A. They have to do with appliance of the various agreements, working agreements, with the employees performing service; handling claims, grievance, disputes that might arise under those agreements; serving Section 6 Notices of desired changes; processing Section 6 Notices served by the organizations.

Q. In what capacity, do you draft and prepare proposed agreements which are submitted to the organizations? A. On occasions, yes, sir.

Q. Did you participate in the drafting of a document entitled "Conditions of Employment", dated September 1, 1963? A. Well now, that is not an agreement. It wasn't served as a notice.

Q. I believe the question was, did you participate in the drafting of a document? A. Yes, I did.

Q. I hand you a document entitled "Conditions of Employment" applying to employees of Florida East
78 Coast Railway Company", and ask you if that is the conditions of employment of September 1, 1963? A. It appears to be a reproduction of what was formulated, yes.

Mr. Shapiro: I ask that this document be marked for identification as Plaintiff's Exhibit No. 2.

The Court: Mark it.

(The referenced document was marked Plaintiff's Identification Exhibit No. 2.)

Mr. Shapiro: I ask that this be received in evidence as Plaintiff's Exhibit 2.

The Court: Is it objected to?

Mr. Devaney: No objection.
The Court: Mark it in evidence.

(Thereupon, Plaintiff's Identification Exhibit No. 2 was received and filed in evidence.)

By Mr. Shapiro:

Q. I show you a document consisting of a letter dated September 24. 1963, to which is attached a further
79 document entitled "The Uniform Working Agreement between Florida East Coast Railway Company and Employees Represented by" the labor organizations listed thereon.

Is this the notice of September 24, 1963, with attachments which were served upon the 17 labor organizations listed thereon? A. This is a portion of notice. The addressees are not attached thereto.

Q. The addressees are not attached.? A. That's correct. And of course, this is a reproduction of the original. It has been retyped.

Q. It has been retyped?

Does it appear to be substantially the document, or is it the document except for the retyping? A. Without reading it word-for-word, I can't tell if it's exact or not. It appears to be a reproduction of it.

Q. Mr. Wyckoff, have you read the complaint in this action? A. Yes, I have.

Q. Have you read the affidavit of Mr. William C. Thompson? A. Yes.

80 The Court: Isn't it Eugene Thompson?
Mr. Shapiro: Your Honor?
The Court: Isn't it Eugene instead of—
Mr. Shapiro: Eugene C. Thompson, yes, sir.

By Mr. Shapiro:

Q. Can you tell me whether the attachment to Exhibit 12 of the affidavit of Mr. Eugene C. Thompson, which I now show you, is the "Uniform Working Agreement" be-

tween the Florida East Coast Railway and the employees represented by the organizations listed thereon, which was proposed on September 24, 1963? A. Yes, it's a reproduction of it.

Q. Now, the document which I'm now going to show you is about identical with the exhibit to the affidavit of Eugene C. Thompson which we have just described; is that correct? A. Well, as I said—

Q. You may compare them. A. You asked me whether this was the notice that was served. I said this appears to be a reproduction, or a retyping of the notice, with the exception of the addressees.

81-82 Q. And the attachment entitled "Uniform Working Agreement"? A. It appears to be the same as that appended to Mr. Thompson's affidavit.

Mr. Shapiro: I ask that the "Uniform Working Agreement" between the Florida East Coast Railway and the employees represented by the organizations listed thereon, which has been identified by the witness as being the same as the attachment to Exhibit No. 12 to the affidavit of Eugene C. Thompson, be marked as Plaintiff's Exhibit No. 3.

The Court: I wonder if there's any need to duplicate in this record.

Mr. Shapiro: I don't think there would be, Your Honor. I believe the exhibits to this—

The Court: I am going to consider the affidavit and the attachments.

Mr. Shapiro: Fine; well, in that case, I won't—

83 The Court: This is a part of Exhibit 12 to the affidavit. I see no reason to put it in twice.

By Mr. Shapiro:

Q. Now, one final document, which is not in the record: I show you a document which purports to be a typewritten copy of a letter from the Florida East Coast Railroad to the Brotherhood of Locomotive Engineers, the Brotherhood

of Railroad Trainmen, the Order of Railroad Conductors and Brakemen, and the Brotherhood of Locomotive Firemen and Enginemen. Attached thereto is a document entitled "The Uniform Working Agreement between Florida East Coast Railway Company and Employees represented by" those organizations.

Mr. Devaney: Your Honor, I object to this. It seems to me that this is totally immaterial to anything we have in this proceeding.

Now, Mr. Shapiro asked earlier a question which I, as counsel, responded to but I think, to go into the questioning about the operating unions in this case which are not parties, not made—there's no portion of the complaint that alleges any action about these unions, I think this
84 is totally immaterial and I object to going into correspondence or any other documents with organizations that are not in any way involved in this litigation.

Mr. Shapiro: Your Honor, I submit that these organizations may well be involved in this litigation in that, if the "Conditions of Employment" as applied to the operating organizations which remains in issue can be developed through testimony, then we have to demonstrate that these conditions do apply to these organizations.

If I'm able to establish through Mr. Wyckoff's testimony that they do not apply, that the "Conditions of Employment" do not apply, and we can develop exactly what does apply to these organizations, it may be that the issue will be dropped from the case; but at this point in our proof, it is not established that the "Conditions of Employment" apply to the organizations.

Your Honor asked earlier in the course of the opening statement that we develop just what is going on with respect to these operating organizations.

Now, there has been a series of changes of position by the carrier and I think we can clarify in the
85 record by going through the various notices that have been served and withdrawn to establish what is going on.

Mr. Devaney: Your Honor, this merely points up again the fallacy of proceeding with this case, in our judgment. Now, Mr. Shapiro is now saying that the operating unions are involved in this case because of the uncertainty as to what rules may apply to them.

Now, one of the operating unions was the Brotherhood of Railroad Trainmen. One case has already been before Your Honor involving the Brotherhood of Railroad Trainmen. The complaint which is brought in this case is on behalf of 17 or 18 organizations, depending on how you count them, none of which, except the International Association of Railroad Employees, is an operating union.

Now, to go into matters which are beyond, completely beyond the complaint in this action as to what may or may not have happened or occurred to the other operating unions is simply beyond the scope of any information that's material to this complaint.

Now, they are not a part of it. No suit has been
86 brought on their behalf, and to go into it at this time is entirely beyond the scope of this complaint.

Mr. Shapiro: Your Honor, the complaint contains three Counts: Count I, dealing with the union shop abrogation; Count II, dealing with the September 24th notice to the non-operating organizations; and Count III, dealing with the "Conditions of Employment" of September 1, 1963.

Now, I believe I can show that those "Conditions of Employment" were applied to the operating organizations, and I would like to find out whether they are still being applied to the operating organizations or whether they have been abandoned. If they are being applied to the operating organizations under Count III, it is in the Government's view a violation of the Act. I think we are entitled to make our proof on that.

Mr. Devaney: Your Honor, these various organizations are listed in the complaint and I merely want to point out

to Mr. Shapiro that the complaint does not allege general violations as to unidentified labor organizations
87 but very carefully specifies those in Exhibits A, B and C attached to the complaint, and these operating organizations are not organizations listed in either Exhibit A, B or C.

The Court: Well, without accepting Mr. Shapiro's version of the scope of the third Count, I'm going to permit him to inquire along this line and the objection is overruled.

I don't, by doing that, mean to imply that I accept without reservation your estimate of the scope of the third Count.

Mr. Shapiro: Yes, sir.

The Court: I will permit inquiry in it.

By Mr. Shapiro:

Q. Well, I show you a document entitled—which is a letter from the Florida East Coast Railway to the Brotherhood of Locomotive Engineers, the Railroad Trainmen, the Order of Conductors and Brakemen, and the Brotherhood of Locomotive Firemen and Enginemen, with an attachment thereto entitled "The Uniform Working Agreement between the Florida East Coast Railway Company
88 and Employees represented by" those organizations.

Is this the proposed "Uniform Working Agreement" for operating organizations which was served on September 25, 1963? A. It's a reproduction of it, yes.

Mr. Shapiro: I ask that this be marked as Plaintiff's Exhibit No.—

The Clerk: 3.

Mr. Shapiro: I might say that this is the same document which is before the Court in United States v. Florida East Coast Railway, in No. 260, in 1963.

Mr. Devaney: Your Honor, I have no objection to the authenticity of the document. I merely object as to materiality.

The Court: Yes, sir, I understand; it's along the line of the previous objection.

Mark it in evidence.

(The reference document was received and filed in evidence as Plaintiff's Exhibit No. 3.)

89 By Mr. Shapiro:

Q. One final preliminary question, Mr. Wyckoff:

Have you received a subpoena directing you to bring certain documents with you? A. Yes, I have.

Q. Have you brought those documents with you? A. Yes, I have them with me.

Q. The subpoena calls for:

"Every kind of form, application, waiver, agreement or contract relating to employment on the Florida East Coast Railroad which the Florida East Coast Railway Company requested or required employees and applicants for employment to execute since September 1, 1963 to the present date."

Now, I think we might, if I might just examine those—do you have them? A. Yes. If I could leave the stand, I'll get them.

(The witness leaving the witness stand and proceeding to counsel table and obtaining envelope, which he tendered to Mr. Shapiro)

(The witness resumed the witness stand)

Q. There is a substantial sheaf of documents here.

90 I wonder if we could have them marked as the documents which the witness has brought with him.

The Court: Well, I don't think that any dispute is going to arise about that. Do you want the Clerk to—there are a number of documents in this manila envelope?

Mr. Shapiro: Yes, Your Honor, there are.

The Court: Do you want to leave the whole envelope there with the Clerk and pull them out as you go along?

Mr. Shapiro: I think that might be the—

The Court: I don't think there will be any dispute about that.

Mark it 4 for identification, and anything that comes out of it can—

Mr. Shapiro: Perhaps it might be simplest—I think I know what I'm after; perhaps I could ask Mr. Wyckoff to get it for me.

91 The Court: Let him pull it out of the packet and identify it.

By Mr. Shapiro:

Q. Will you take this, please (handing envelope to witness).

Mr. Wyckoff, you have signed the answer stating that you've read the facts therein and that they are true.

Now, in the eleventh paragraph of the answer, which I shall show you, there is a statement that the defendant —I'm omitting a few lines—states that from—this is at page 8 of the answer at the top, states:

"That from September 1, 1963, until on or about October 30, 1963, it did require each employee to sign for a copy of the document entitled 'Conditions of Employment' ", which signified his willingness to work thereunder; and that since on or about October 30, 1963, it has required employees hired after that date to sign for a copy of the "Uniform Working Agreement" which became effective on October 30, 1963, and his signature signified his willingness to work thereunder.

Do you have copies of the signature forms which are required of employees? A. Yes, sir. Here are the

92 Rules of Conduct form (tendering instrument); I'm sorry, "Conditions of Employment" form, and this is the "Uniform Working Agreement" form. (Tendering instrument)

Q. Is this the document which you've identified as the "Conditions of Employment" form? (Indicating) A. That's correct.

Q. Does that refer to the "Conditions of Employment" of September 1, 1963? A. That's correct.

Mr. Shapiro: I ask that this be marked as the plaintiff's next exhibit. (Tendering instrument to Mr. Devaney) I offer it in evidence as the plaintiff's next exhibit.

Mr. Devaney: No objection.

The Court: Let's call this 4A.

(Thereupon, the referenced document was received and filed in evidence as Plaintiff's Exhibit No. 4A.)

The Court: I think that will indicate they are matters produced by Mr. Wyckoff under the subpoena.

93 The Clerk: Yes, sir.

By Mr. Shapiro:

Q. And this—is this the "Uniform Working Agreement" document? (Indicating) A. That's the receipt for the "Uniform Working Agreement".

Mr. Devaney: I'm sorry, Your Honor. What is being marked as Exhibit 4?

The Court: Well, anything that comes from these papers produced by Mr. Wyckoff will be 4 generally and 4A is the receipt for "Conditions of Employment" form.

Mr. Devaney: I understand.

The Court: And this one is receipt for the "Uniform Working Agreement"; is that right?

Mr. Shapiro: That's right, Your Honor.

The Court: That would be 4B.

Mr. Shapiro: 4B; we offer this in evidence as the

94 plaintiff's Exhibit 4B.

The Court: 4B received.

(Thereupon, the referenced material was received and filed in evidence as Plaintiff's Exhibit 4B.)

By Mr. Shapiro:

Q. And now the remaining—do you have in that envelope the collective bargaining agreements currently in force— A. Yes.

Q. —with the non-operating organizations and the International Association of Railway Employees? A. Each of the organizations listed in the complaint.

Q. To the best of your knowledge, are these up to date? A. Yes. I have the various modifications with the agreements.

Q. Are there any remaining forms in this envelope which employees are required to sign? A. Yes, there is a Bulletin No. 1 for which employees are required to sign. It's a receipt form.

Q. What is that document? A. It's the large document standing on end. (Indicating)

95 Q. And what other documents, sir? A. There are receipt form documents for various materials; such as operating rule books, safety rule books, and so forth. Any receipt for a switch key, in the case of an individual who should receive a switch key, documents of that nature.

Q. Can we state, in order to save time, that the contents of this envelope, the remaining contents, consist of collective bargaining agreements for the non-operating organizations and, I believe, the International Association of Railway Employees— A. That's correct.

Q. —and remaining personnel forms which the employees are required to sign? A. That's right.

Mr. Shapiro: I wonder if I could just offer this?

The Court: This can be 4 generally. If there is any need later to extract individual documents and refer to them, I think they might be given a 4 and another letter.

96 Mr. Shapiro: Fine.

The Court: All right, just mark the envelope then as 4.

(Thereupon, the referenced document was received and filed in evidence as Plaintiff's Exhibit 4)

Mr. Milledge: Your Honor, might we just note at this time on behalf of the organizations that we would like the opportunity to have our people look these over at some convenient time when the Court is not actually in session, so that in the event—

The Court: You and the Clerk can work that out.

Mr. Milledge: All right. But we do want to reserve any objection we might have. There may be some amendments that are not present.

The Court: I understand. It's put here because—they are given a designation because they are what Mr. Wyckoff has produced in response to the subpoena.

Mr. Milledge: Right.

97 The Court: And we want to give them—

Mr. Milledge: Which he asserts to be the contracts.

The Court: Yes, sir.

Mr. Shapiro: Well, I think we can return to the questions we would like to ask at this time.

By Mr. Shapiro:

Q. Mr. Wyckoff, at the present time, are the "Conditions of Employment" of September 1, 1963, which have been received as Plaintiff's Exhibit No. 2, which I now show you, in force and operation on the Florida East Coast Railway Company? A. No, they are not.

Q. Is this true for all—does this mean that no class or craft of employees of the carrier is working under these "Conditions of Employment" at the present time? A. That's correct.

Q. Now—

The Court: But they are working under the, what's called the working agreement of September 24 and September 25?

98 The Witness: Some crafts are, Your Honor. The operating crafts are working under the original working agreements, as modified by the 1959 rules notices.

The Court: Yes, sir.

By Mr. Shapiro:

Q. Now, it's in connection with that that I'd like to ask you a few questions, Mr. Wyckoff.

Prior to September 25, 1963, what agreements were your operating crafts or classes actually working under?

Mr. Devaney: Your Honor, I object to this on the basis of materiality. I don't see that what was or was not done in the operating crafts, who are not named in the complaint, is properly before this Court, and I think it's immaterial.

The complaint is brought on behalf of these—

The Court: This is the same question as I understand—the same argument we went through awhile ago.

Mr. Devaney: In part, Your Honor, but he has just established that they are not now in effect, so I see no
99 purpose in further burdening the record to go back to develop what occurred before September 25 with respect to the operating crafts.

The Court: The objection is overruled.

Mr. Shapiro: May I have the question, please.

The Reporter: "Prior to September 25, 1963, what agreements were your operating crafts or classes actually working under?"

The Witness: Mr. Shapiro, the only way that an agreement can be changed is by Section 6 notice. The Section 6 notices were served on September the 24th and 25th.

Now, until those agreements were negotiated and notices had been served, the original agreements remained in effect.

I'm not saying that we could have complied or did comply with those agreements that were in effect, because of the shortage of manpower. The unions went on strike or respected the picket lines of striking employees. They had a right to assert economic pressures against the carrier. By the same token, the carrier
100 had a right to operate. In order to operate, they had to do so in the manner most feasible with the

manpower available, so, for that reason, there were some deviations from the agreements that were in effect at the time; but the agreements, as such, were not changed.

By Mr. Shapiro:

Q. Now, speaking not of agreements, Mr. Wyckoff, but of rates of pay, rules and working conditions, what rates of pay, rules and working conditions were you operating under prior to September 24, 1963, as far as the operating crafts or classes were concerned? A. Well, as I said, there were deviations from the agreements. Various classes of work had to be consolidated because of the shortage of manpower and rates of pay differed from this set forth in the agreements, but it was only during the interim period of the strike.

Q. Mr. Wyckoff, you haven't answered my question. The question is: What rates of pay, rules and working conditions were you operating under as far as the operating crafts or classes were concerned? A. As far as the classes and crafts were concerned, we operated under the rates of pay that were in effect in the old agreements, but we had to deviate from the conditions set forth in those agreements; so, therefore, the rates of pay deviated also.

101

Q. Mr. Wyckoff, I show you Plaintiff's Exhibit No. 2, a document entitled "Conditions of Employment Applying to Employees of Florida East Coast Railway Company".

Can you tell me whether that document applies to employees in the operating crafts or classes—applied to the operating crafts or classes of the Florida East Coast Railway Company? A. It did apply, yes, for a period of time.

Q. So this was the rates of pay, rules and working conditions which you were operating under prior to September 24, 1963, and after September 1, 1963? A. We were operating in the manner set forth in this but this did not change the rates of pay, rules or working conditions in the duly negotiated agreements.

Q. Now, Mr. Wyckoff, I show you a copy of Plaintiff's Exhibit 4A and ask that you read the text of the Agreement. (Tendering instrument to the witness) A. It's addressed to the individual and, after he fills out the preliminaries as to his job classification, rate of pay, home address, and so forth, it reads as follows:

"I have this date been furnished with a copy of
102 the 'Conditions of Employment' in effect on the Florida East Coast Railway Company. These 'Conditions of Employment' are completely satisfactory to me, my signature hereon signifying my acceptance thereof and willingness to work thereunder."

Q. Now, Mr. Wyckoff, in your verified answer to the complaint in this action, you stated, at the top of page 8, that:

"Until on or about October 30, 1963"—

I'm paraphrasing the language—

"the Florida East Coast did require each employee to sign for a copy of the document entitled 'Conditions of Employment', which signified his willingness to work thereunder."

Now, was any employee working under any conditions except the "Conditions of Employment" which they were required to sign for? A. You mean prior to October 30?
Q. Yes. A. No.

Q. Then— A. Other than supervisory personnel,
103 of course.

Q. All right. Then the "Conditions of Employment" were the exclusive rates of pay, rules and working conditions for anybody actively in employment by the carrier; were they not? A. They were the rates of pay that were being applied at the time during this interim period, yes.

Q. The question was rates of pay, rules and working conditions, Mr. Wyckoff. Were they also the rules and working conditions? A. Yes. As I said a minute ago, we weren't able to comply with the agreements that had been negotiated because of the shortage of manpower.

Q. And these conditions were the exclusive agreements—I'm sorry—these conditions were the exclusive rates of pay, rules and working conditions for the people showing up for work? A. That's right. They were a formulation of rates of pay, rules and working conditions that applied during that interim period of time.

Q. So that you were not working under the agreements, were you, Mr. Wyckoff? A. We were working under the agreements but we were forced to deviate from the agreements.

104 Q. And you just said that this was the exclusive agreement under which people who were actually employed were working? A. I didn't say that was the exclusive agreement. I said those conditions applied during that interim period that we were forced to deviate from the agreements.

Q. I understand that your claim is that you were forced to deviate from the agreements.

Now, you've also testified that nobody was working under any other conditions of employment. I'm not asking you why you had the "Conditions of Employment". I'm just asking you what conditions of employment were in operation.

Now, it was these and only these, was it not? A. That's correct, yes.

Q. All right.

Now, did these conditions—you've already testified, I believe, that the "Conditions of Employment" applied to the operating personnel.

Mr. Wyckoff, do you recall having testified in action entitled "United States of America vs. Florida East Coast Railroad, No. 63-260-Civil-J, on— A. Yes, I do.

Q. —on December 11, 1963? A. Yes, sir.

105 Q. Do you recall that I was the attorney conducting the examination? A. That's correct.

Q. Now—

Mr. Devaney: Your Honor, I object to going into this. It seems to me totally immaterial. I don't see what Mr. Shapiro is attempting to prove here.

The Court: I take it that this is an impeachment by his testimony in the prior proceeding?

Mr. Shapiro: I'm trying ultimately, Your Honor, to establish what is going on on the carrier, and I do want to be sure that we have exhausted the witness' knowledge in light of some of his prior statements.

The Court: You may proceed. Do you have a transcript of that?

Mr. Devaney: No, I do not, Your Honor.

The Court: Well, I'll be glad to have you look over Mr. Shapiro's shoulder as he goes ahead.

106 Mr. Devaney: Well, if there—

The Court: You might make some kind of a mark there.

Mr. Shapiro: Yes, I have.

The Court: We don't have our transcript here? We don't have that other file here, do we?

The Clerk: No.

By Mr. Shapiro:

Q. Now, Mr. Wyckoff—

The Court: Excuse me. Could somebody go get it, get it from the Clerk's office, 63-260, and get the transcript, Mr. Hamilton, and then the portions of it that Mr. Wyckoff is questioned about can be marked with a red pencil or something, so that you will know what to go back to. It won't take but a second.

Mr. Devaney: Your Honor, I have no objection to proceeding if Mr. Shapiro will jot down the page numbers. I

can jot it down and we will look at it as soon as they
107 bring your copy.

The Court: All right. What page are you on?

Mr. Shapiro: I think this is page 148 and 149 of the transcript.

The Court: All right, sir. You might give him the lines. Aren't the lines numbered?

Mr. Shapiro: Yes, they are.

The Court: Where do you begin?

Mr. Shapiro: I think it begins at line 17.

The Court: Page 148.

Mr. Shapiro: On page 148, and goes through—

The Court: Well, you can tell him when you stop. You can give him another designation. You might proceed, then.

By Mr. Shapiro:

108 Q. Mr. Wyckoff, how long did the carrier continue to operate under the rates of pay, rules and working conditions set forth in the "Conditions of Employment" of September 1, 1963, as applied to operating crafts and classes? A. Actually, we worked under at least some of those conditions until February the 25th of this year.

Q. I see.

Mr. Wyckoff, in the previous action, which I have already mentioned to you, I asked you:

"Now, with respect to the non-supervisory personnel who are presently operating your trains, what agreement or what arrangement with respect to rates of pay, rules and working conditions are in effect for them now?"

And your answer:

The Court: That's on page 148, line?

Mr. Shapiro: 148, line—

The Court: 17?

Mr. Shapiro: No, I guess I'm starting a little
109 lower. It's line 25, the very last line.

The Court: All right.

By Mr. Shapiro:

Q. Your answer, sir was:

"The rule that became effective November 4, 1963."

Do you recall what rule that was? A. No, I'm sorry, I don't.

Q. To refresh your recollection, I show you Plaintiff's Exhibit No. 3. (Tendering document to witness) A. Yes, sir.

Q. Is that the rule which became effective November 4, 1963? A. That did with respect to other than the trainmen. The trainmen continued to negotiate.

Q. Now, that is the "Uniform Working Agreement" for the operating crafts or classes, is it not? A. That's correct.

Q. I then asked you:

"And prior to November 4, 1963, what was in effect?" Your answer was:

"We worked under the old rules that were in 110 effect."

Now, are the "Conditions of Employment" of September 1, 1963, the old rules that were in effect? A. No. They were never rules in effect. The old rules in effect that I had reference to with respect to the trainmen were the '49 rules.

With respect to the other crafts, the dates differed but those were the rules that were in effect.

As I said, we were forced to deviate to some extent from those rules and that deviation was formulated in the "Conditions of Employment".

Q. What were you actually working under, Mr. Wyckoff? A. We were actually working under the rules that were negotiated. We were deviating from those rules because of the shortage of manpower. We were forced to deviate.

Q. What do you mean by "working", Mr. Wyckoff? A. We were applying the rules to the extent possible with the manpower we have available.

Q. You just—you testified a few moments ago that the "Conditions of Employment" were the exclusive rates of pay, rules and working conditions applied to the operating crafts or classes; did you not? A. That's correct.

Q. And how could you be working under the old
111 rules in effect when you were working under the "Conditions of Employment"? A. Because you can't change the rules that are in effect unless you go through the process of the Railway Labor Act.

The Court: You are telling us about the law. He is asking you what you did.

The Witness: Your Honor, we applied those rules to the extent possible with the manpower we had available. As I said, we were forced to deviate from those rules because of the shortage of manpower and that deviation was formulated in this "Conditions of Employment".

The Court: For instance, Mr. Wyckoff, the shortage of manpower caused you to deviate by offering higher wages than specified in the 1949 agreement, as amended, or the earlier working agreements with these various crafts?

The Witness: That was one of the results, yes, sir; we were forced to consolidate positions. Where a man before did one specified type of work, under the conditions
112 that were in effect as a result of the strike, he did several types of work.

Mr. Shapiro: Well, Mr.—

The Court: You may proceed.

By Mr. Shapiro:

Q. Mr. Wyckoff, how can you state that you are working under the old rules when you are in fact working exclusively under the "Conditions of Employment"?

Mr. Devaney: Your Honor, I think this is becoming argumentative. Mr. Wyckoff has stated his position and—

The Court: I would like it clarified. It has been a mystery to me all through this proceeding, some of these answers. I would like it clarified as best Mr. Wyckoff can clarify it and as best I can understand it.

Mr. Shapiro: Has the witness answered the question?

The Reporter: No.

113 Mr. Shapiro: Would you read the question, please.

The Reporter: "Mr. Wyckoff, how can you state that you are working under the old rules when you are in fact working exclusively under the 'Conditions of Employment'?"

The Witness: As I said a minute ago, the rules that are in effect are those that are negotiated. We can't change those rules unilaterally. We can deviate from the rules where we have to in order to operate the property.

By Mr. Shapiro:

Q. Were the "Conditions of Employment" in effect? A. The "Conditions of Employment" did not go into effect as such. They were simply a formulation of practices that arose during the period of the strike.

Q. You say that they didn't go into effect as such. You required each employee to sign for those "Conditions of Employment" and you state that they worked under them? A. That's correct.

Q. Were they in effect as to employees who signed for them? A. The employee was being paid in accord-

114 ance with them, yes.

Q. And did he work in accordance with them? A. Yes, he did.

Q. Was his seniority measured in accordance with them? A. Yes.

Q. And were his assignments measured in accordance with them? A. Yes.

Q. Was his job classification measured in accordance with them? A. Yes, because they were deviations from the rules.

Q. Were the disciplinary procedures measured in accordance with them? A. Yes.

Q. Were the hours of pay, hours of work, measured in

accordance with them? A. Yes, all the conditions set forth were those that applied during this interim period.

Q. And nobody was working under any other agreements, I take it, when they were actually employed, everything they did was governed by these "Conditions of Employment", were they not? A. They were working under the other agreements because the other agreements were negotiated agreements. These were simply conditions that applied to them while they performed service.

115

In other words, if the strike was to have ended during any period of time, we would have reverted back to the agreement that was in effect at the time. The "Conditions of Employment" would have gone out the window.

Q. But the agreement was not in effect while the "Conditions of Employment" was in effect? A. Certainly it was. We didn't have the right to unilaterally cancel any working agreement.

Q. I certainly agree with that, Mr. Wyckoff but the fact of the matter is that you were not operating under them, were you? A. No, we could not.

Q. Whatever the explanation is, the fact is you were not operating under them, were you? A. As a result of the unions' actions, we were not.

Q. Thank you, Mr. Wyckoff.

Now, on November 4, 1963, you testified that you put into effect the conditions of September 25, 1963, I think as I recall your testimony; that they continued in effect until February 24, 1964. Is that right, sir? A. No, as a result of the decision of this Court—Are you speaking of the operating crafts?

116

Q. Yes. A. As a result of the decision of this Court, some of the provisions were rescinded.

Q. And now, when you rescinded those provisions, sir, did this have any effect on the rate of pay of any employee operating the trains during that period, the amount that he actually took home with him? A. I would say no, be-

cause the "Conditions of Employment" are somewhat similar to the other rules, the "Uniform Working Agreement". And they worked, continued to work under the "Conditions of Employment" in most cases. So, for that reason, there was no change in the actual takehome pay as you've termed it.

Q. Were there any other changes in the actual working situation of an employee operating your trains? A. Yes. We attempted to comply with the Order of the Court. We advertised positions in accordance with the old agreement, old agreements. We received no bids from the men on strike or respecting the picket lines of striking employees. There was nothing else we could do.

Q. What did you do to comply with respect to the employees who were actually working? Did you pay them under your "Conditions of Employment" or under the previous collective barganing agreement? A. We
117 paid them under the "Conditions of Employment" because we were forced to deviate from the collective bargaining agreement as a result of the shortage of manpower.

Q. Mr. Wyckoff, why didn't you mention the "Conditions of Employment" when you were being questioned by he on December 11, 1963?

Mr. Devaney: Now, Your Honor, I object to this. If counsel is going into this, I'm going to insist that we put him on the stand, because there was no doubt that Mr. Shapiro had discussed with me and was fully apprised of the "Conditions of Employment".

Now, the fact that he didn't ask about the "Conditions of Employment" was a matter that he chose not to go into with the witness. So I think, as to why he did not ask a question, it's improper. If he wants to examine him on the theory of credibility as to what Mr. Wyckoff actually testified to, that's his prerogative, but to go into matters as to why he did not mention something he was not asked about, I think is totally improper.

The Court: The objection is overruled. It is not a question of whether he was asked about. He was
118 asked about what agreements were in effect, what rates of pay, rules and working conditions were in effect.

The objection is overruled.

You may proceed.

By Mr. Shapiro:

Q. Now, Mr. Wyckoff, the question you were asked was what agreement or what arrangement with respect to rates of pay, rules and working conditions are in effect for them now. And you've testified today, for everybody who was actually working and signed for these "Conditions of Employment", as to them, the "Conditions of Employment" were in effect.

But you testified in answer to the question:

"What agreement or what arrangement with respect to rates of pay, rules and working conditions are in effect for them now?"

that

"The rule that became effective November 4, 1963."

You didn't mention the "Conditions of Employment".

And then you were asked:

"And prior to November 4, 1963, what was in effect?"

119 And you answered:

"We worked under the old rules that were in effect."

And you testified that the old rules are not the "Conditions of Employment".

I repeat: Why didn't you mention the conditions of September 1, 1963? A. Because you asked me what agreement was in effect, the agreement or conditions was in effect.

Q. I asked you what— A. And as I just told you today, the "Conditions of Employment" did not go in effect as

such. They were simply a formulation of practices that arose during the period of the strike.

Q. You were asked what conditions or arrangements were in effect. A. That's right.

Q. Is the "Conditions of Employment" of September 1, 1963, an arrangement necessitated by the strike? A. It never went into effect. I told you that today.

Q. Mr. Wyckoff, you just testified that it was in effect for the employees who signed for it.

Mr. Devaney: Let me object again. If Mr. Shapiro is going to examine and try to impeach the witness, I would please direct him to his own question when he asked about, he said:

120

"Q. Now, with respect to the non-supervisory personnel who are presently"—

And remember, this is in December—

"who are preesntly operating your trains, what agreement or arrangement with respect to rates of pay, rules and working conditions are in effect for them now?"

And Mr. Wyckoff answered:

"The rule that became effective November 4, 1963."

Now, Mr. Shapiro asked about rules, arrangement, and so forth.

The Court: He asked him what was in effect.

Mr. Devaney: That is correct; that is correct.

When he came down to his next question, he said not all this gobbledygook about rules, arrangement, and so forth; he asked him one specific question and that was this:

"The rule that became effective November 4, 1963?"

121

Then the question was:

"And prior to November 4, 1963, what was in effect?"

And Mr. Wyckoff said:

"We worked under the old rules that were in effect."

Now, I don't see what Mr. Shapiro is getting at in trying to imply that less than a full answer was given to the questions he asked. Now, the fact that he did not specify

and ask about something that he now wants to inquire about, I repeat, is improper.

The Court: Objection overruled.

Mr. Devaney: He did not ask that question.

The Court: Excuse me, are you finished?

Mr. Devaney: Yes, I have.

The Court: Objection overruled.

You may proceed.

122 By Mr. Shapiro:

Q. Now, Mr. Wyckoff, I asked you subsequently the following question. This is at line 7 on page 149:

"And am I correct, Mr. Wyckoff, that if the rules which were put into effect on November 4, 1963, were to be withdrawn, that the previously existing arrangements would be placed in effect, would govern the employment, would govern the rates of pay, rules and working conditions of the employees in the crafts or classes who are presently operating your trains?"

And you stated:

"We would revert to the last duly negotiated rules, which were those in effect prior to November the 4th."

Now, were employees who were presently—I mean, in December—operating your trains working under rates of pay, rules and working conditions contained in the last duly negotiated rules? A. They were working under those rules, yes. There were deviations from the rules because of the conditions created by the employees represented by the unions not working.

123 Q. You have stated that the "Conditions of Employment" were not duly negotiated rules; is that right? A. That's correct.

Q. You've also stated that the employees were working actually on the job under the "Conditions of Employment"; so that, if you reverted to the last duly negotiated

rules, you would not have reverted to the "Conditions of Employment"; is that right? A. We would have reverted back to the rules that were duly negotiated; in the case of the trainmen, it was the 1949 rules. Now, whether we could have complied with all provisions of those rules was an entirely separate question. We could not comply unless the employees represented by the unions returned to work.

Q. You weren't asked that question. You haven't been asked that question.

Now, Mr. Wyckoff— A. I'm trying to give you a full answer, Mr. Shapiro.

Q. The question really goes down to whether your duly negotiated rules were in effect or not for the people operating your trains. And you testified you weren't paying under them, you weren't working them under them, your seniority wasn't under them; so that the duly negotiated rules were not in operating effect, were they?

124 A. The duly negotiated rules remained in effect. As I told you before, we do not have the right to unilaterally change the rules or take it out of effect.

The Court: Mr. Wyckoff, they remained in effect in the sense that there had been no abrogation of them by any notice to or from you or the railway or the unions. They were in effect in that sense that they were still documents, but they weren't being—no operation was being carried on under them. I think that's the way I understand it.

The Witness: That's what I said, Your Honor. We couldn't comply wholly with those rules because of the shortage of manpower. They were in effect.

You couldn't comply with them when an employee came on the job, you made him sign for and agree to be bound by these "Conditions of Employment". You couldn't, as long as you were doing that, you couldn't comply with the prior existing agreements.

The Witness: That's what I say. We could not comply with them—

125 The Court: That's for sure.

The Witness: —because we did not have the manpower. And these conditions simply told the man coming to work what conditions he would have to work under during the period of the strike.

The Court: You didn't limit it; there's no limit in that receipt he signed.

The Witness: It isn't spelled out in the receipt, but each man was told that.

The Court: Is it spelled out in the "Conditions of Employment" that this is an emergency strike measure and applies only during the strike?

The Witness: Every man was told that these conditions applied only—

The Court: Every man was given a written "Conditions of Employment" agreement. Every man was required to sign a receipt for it.

Now, in either of those documents, is there any
126 indication that this is an emergency strike measure?

The Witness: No, it is not spelled out as such in the document.

The Court: All right, sir.

By Mr. Shapiro:

Q. One final question on this aspect:

After the judgment of this Court in the case that was tried on December 11, 1963, and you gave the testimony which we have been discussing, did you revert to the last duly negotiated rules which were in effect prior to November 4, 1963? A. Yes, we did, to the extent possible with the manpower available.

Q. Did you operate under them? A. We attempted to. We bulletined the jobs under them. We received no bids from the employees who were not working.

Q. Did you require employees who came to work to sign the document making the "Conditions of Employment" the exclusive conditions under which they would work? A. We made them sign a document acknowledging

receipt of those conditions and a willingness to work thereunder and, as I say, that was because of the con-
127 ditions imposed by the strike.

Q. And that was the extent of your reversion to the rules of November 4, prior—I beg your pardon. That was the extent of your reversion to the rules in effect prior to November 4, 1963? A. Mr. Shapiro, we couldn't operate under those rules if we didn't have the manpower to do it.

The Court: Well, the answer is yes?

I think we've had this same statement and answer to enough questions for me to know your position in this respect.

The answer to the question is yes, as I understand it; is that right?

The Witness: Well, as I say, we attempted to revert to the old rules, Your Honor.

The Court: Don't make that statement again. I've got your position in that respect.

By Mr. Shapiro:

Q. And now, the "Conditions of Employment", as I recall your testimony, the "Conditions of Employment" were what your people on the job were working
128 under? A. They were working in compliance with that.

Q. Until February 24, 1964; is that right? A. (No response)

Q. Is that right, sir? A. February 24—you're speaking of the non-operating crafts?

Q. No, the operating crafts. A. Operating crafts, I believe, February 25.

Q. February 25.

Now, on February 25, you put a new set of rates of pay, rules and working conditions into effect; did you? A. We didn't put a new set of rates of pay, rules and working conditions in effect. We modified the agreements then in effect by the 1959 rules.

Q. Well, your answer is, I take it, that you were operating after February 25, 1964, you were actually operating under the November— I'm sorry— after February 25, 1964, you were operating under the basic collective bargaining agreements for your operating crafts or classes as amended by the November 2nd, 1959, notice; is that correct? A. That's correct.

Q. Now, did you give notice to the—to any of the operating organizations of your intent to put these rates of pay, rules and working conditions in effect? A. We gave
129 notice to each of the operating organizations.

Q. I show you a letter dated February 24, 1964, from the Florida East Coast Railway Company to the Order of Railway Conductors and Brakemen, Brotherhood of Locomotive Engineers and Brotherhood of Firemen and Enginemen.

Is this the notice which you gave to those organizations? (Indicating) A. This is the notice that we gave to three of the organizations, yes. There was a separate letter written to Mr. Van Arsdall.

Q. We will take that in a moment, sir.

Mr. Shapiro: I ask that this be marked as Plaintiff's next exhibit.

The Clerk: Are you offering it?

Mr. Shapiro: I shall offer it.

The Court: 5?

The Clerk: 5.

130 Mr. Shapiro: Do you have any objection, Mr. Devaney?

Mr. Devaney: No, I have no objection.

The Clerk: Received as 5.

(Thereupon, the referenced document was received and filed in evidence as Plaintiff's Exhibit No. 5.)

Mr. Devaney: Except as noted before on materiality.

The Court: Yes, sir. I think that your objection to this line of testimony will be addressed to this document also.

Mr. Devaney: Yes, sir, that's correct, Your Honor.
The Court: And it was in that light.

By Mr. Shapiro:

Q. And I show you a letter dated Febuary 24, 1964, to Mr. H. O. Van Arsdall, Brotherhood of Railroad Trainmen? Is this your notice to the Brotherhood of Railroad Trainmen? A. Yes, it is.

131 Mr. Shapiro: I ask that this be marked and received in evidence. (Tendering to Mr. Devaney)

The Court: Mark this one 6. Is it similar to 5?

Mr. Shapiro: The wording is quite different, Your Honor, for reasons which I'll develop.

The Court: That's all right. You might hand them both up.

(Thereupon, the referenced document was received and filed in evidence as Government's Exhibit No. 6.)

The Court: Do you want to inquire about it?
Mr. Shapiro: I would like to ask a few questions. Your Honor may wish to examine the letter.
The Court: Go right ahead. I'll examine it later.

By Mr. Shapiro:

Q. Now, you have testified, Mr. Wyckoff, that the carrier ceased to operate under the "Conditions of Employment" and, after February 25, 1964, operated under the rates of pay, rules and working conditions in the basic agreements, as amended by the November 2nd, 1959 notice; is

132 that correct? A. That's correct.

Q. Were any other agreements, rates of pay, rules and working conditions, in effect at that time? A. Of course there were rates of pay, rules and working conditions in effect. The old agreements were in effect and they remained in effect as modified by this.

Q. I think my question may have been badly framed. I'll try again.

Were any rates of pay, rules and working conditions, other than the basic agreements for the operating crafts or classes, as amended by the November 2nd notice, in effect after February 25, 1964? A. After February 25, no.

Q. Would this letter refresh your recollection, sir? (Tendering instrument to the witness) This is Plaintiff's Exhibit No. 5. A. (Witness examining exhibit)

Q. Now, having refreshed your recollection, sir, I repeat: Were any rates of pay, rules and working conditions other than the November 2nd, 1959 notices, amending the basic agreements, and the basic agreements themselves in effect after February 25, 1964? A. No, sir.

133

We've complied fully with the rules, as amended, since that time.

Q. Mr. Wyckoff, there is a statement in your letter of February 24, 1964, to Messrs. Bolin, Lemmon & Kitt, of the Conductors, Locomotive Engineers and Locomotive Firemen and Enginemen, respectively, that the work rules placed into effect on November 4, 1963, and not held in abeyance pursuant to C.A. 63-260-Civil-J, remain in full force and effect.

What did that have reference to, sir? A. That had reference to the September the 24th notice—September 25th notice that those—that notice was later withdrawn subsequent to the date of this letter.

Q. But after February 25, you had your "Uniform Working Agreement" for operating employees in effect? A. After February 25?

Q. Yes. A. No, we did not.

Q. Mr. Wyckoff, your letter of February 24, 1964, states that the work rules placed into effect on November 4, 1963, and not held in abeyance pursuant to Civil action 63-260-Civ-J, remain in full force and effect.

Didn't that mean that the uniform working agreement for operating crafts or classes was in full force and effect?

A. It was our position that it was, but there was a
134 dispute as to it, so we simply withdrew the notice.

Q. But it was in effect until you withdrew it? A. We didn't apply it. We applied the rules, the original rules modified by the 1959 rules, amended February 25th.

Q. So then, you told the labor organizations that it remained in effect but it really wasn't in effect; is that right? A. We didn't work under it. We worked under the old rules, because there was a dispute as to whether or not it was in effect. It was our position that it was. It was their position that it was not. They wrote me to that effect. So we simply withdrew it.

Q. Well, until you withdrew it, it was in effect? A. No, we didn't apply it.

Q. But you gave notice that they were both in effect; is that right? A. Well, that's correct, yes. But we didn't apply it because of the dispute.

Q. So you had the November 2nd, 1959, notices in effect and you had the "Uniform Working Agreement" in effect, but not in effect; is that right? A. It was our position that it was in effect. As I say, it was disputed, and since
135 we had a legal right to put the November 2nd, 1959 rules into effect, we put this in effect and worked under them since February 25th.

Q. Now, you stated in this letter also that:

"The work rules held in abeyance pursuant to Civil action 63-260-Civ-J are reinstated and made fully effective as of 12:01 a.m., February 25, 1964."

That was your intent, to put the entire "Uniform Working Agreement" for operating crafts or classes into effect, was it not? A. It was our intent but, as I say, the labor organizations disputed our right to do so and we simply withdrew it.

Q. But this letter—well, let's see, perhaps we should ask a question or two to clarify this, Mr. Wyckoff. I'm puzzled.

Your letter states:

"Upon the expiration of P.L. 88-108, the Carrier will at 12:01 a.m., February 25, 1964, withdraw its Notice of August 29, 1963, withdrawing the work rules placed in effect at 12:01 a.m., on July 2, 1963."

To what did that have reference? A. As a result
136 of the enactment of Public Law 88-108 and action of this Court, we were forced to withdraw certain rules.

Q. What rules were they sir? A. The working rules applying to the three operating crafts, other than the Trainmen.

Q. And what working rules were they? What notice were they under? A. They were under our notice of September 25.

Q. I think you're—I am sure this is just a momentary confusion, sir.

"Upon the expiration of P.L. 88-108, the Carrier will at 12:01 a.m., February 25, 1964, withdraw its Notice of August 29, 1963."

A. I got the wrong date. August 29 is correct.

Q. So that what you are referring to is the November 2nd, 1959, notice; is that right? A. November 2nd '59 notice was put into effect February 25.

Q. Yes. And this is the language giving notice you were putting it in effect; is it not? Would you like to examine it? (Tendering instrument to the witness) A. That's correct.

137 Q. And now you go on to state:

"The purpose of reinstating these rules as of 12:01 a.m., February 25, 1964, even though they have been superseded and replaced by the rules placed into effect on November 4, 1963, is to reaffirm the conditions that existed prior to August 29, 1963."

Did that mean that the November 2nd, 1959, notices were being placed in effect even though they had been superseded and replaced by this "Uniform Working Agree-

ment"? A. The notices were November 2nd, 1959 notices, were put in effect prior to August. They were withdrawn as a result of the enactment of Public Law 88-108. Then when that Law expired, we had a right to put the notice back in effect, simply withdraw the withdrawal of it, which we did.

Q. But your letter states, and you may examine it if you wish, that the purpose of reinstating these rules—referring to November 2nd, 1959, rules—

"even though they have been superseded and replaced by the rules placed into effect on November 4, 1963, is
138 to reaffirm the conditions that existed prior to August 29, 1963. In other words, even though superseding rules are now in effect, the Carrier is aware that you disputed the right of the Carrier to place the superseding rules into effect on November 4, 1963, and that the Mediation Board has docketed your application for mediation in this matter as Case A-7056."

And there were some statements about your difficulties of bargaining.

Now, what you did, I take it, is that you stated that you had superseded the November 2nd, 1959, notice by the "Uniform Working Agreement" of September 25, and you were placing the November 2nd, 1959, notice into effect even though the superseding rules are now in effect, I think are the words in the letter.

Is that what you wanted? Them both in effect; is that right? A. It was our position that the superseding rules were in effect. However, that position was not agreed with by the labor unions or the Mediation Board and, as I said a minute ago, subsequent to the notice, we withdrew the rules that were disputed and left in effect the
139 November 2nd, 1959, notice.

Q. Mr. Wyckoff, I show you a letter dated March 9, 1964, addressed to the General Chairman of the Locomotive Engineers, the Conductors and Brakemen, and the Locomotive Firemen and Enginemen.

Now, is this the notice which you gave that you were withdrawing the "Uniform Working Agreement" which you put into effect on November 4, 1963, and continued in effect until February 25, 1964? A. That's correct. It states that:

"Effective 12:00 p.m. today, March 9, 1964, the notice of September 25, 1963, is withdrawn."

Q. So that the "Uniform Working Agreement" are, as of March 9, 1964, finally withdrawn as to these three organizations? A. That's correct.

Q. Have they been withdrawn with respect to the Brotherhood of Railway Trainmen? A. No. We are still negotiating with the Trainmen.

Q. Mr. Wyckoff, would you identify this, if this is the letter? This is your notice, is it not? A. Yes. It is the letter I wrote of March 9, 1964, to the General Chair-
140 man of the Brotherhood of Locomotive Engineers, the Order of Railway Conductors and Brakemen, and the Brotherhood of Locomotive Firemen and Enginemen, notifying them of the withdrawal that date of the notice of September 25, 1963.

(Mr. Shapiro tendering instrument to Mr. Devaney)

Mr. Shapiro: I ask that this be marked as the Plaintiff's next exhibit.

The Clerk: 7.

Mr. Shapiro: And received in evidence.

(Thereupon, the referenced material was received and filed in evidence as Plaintiff's Exhibit No. 7.)

By Mr. Shapiro:

Q. Why did you withdraw the "Uniform Working Agreement" of September 25, 1963, on March 9, 1964? A. There was a dispute as to whether or not it became effective and, to avoid that dispute, we simply withdrew it.

Q. Did you give any consideration to the judgment of this Court in Brotherhood of Railway Trainmen against the Florida East Coast Railway Company? A. Did we give any consideration?

Q. In deciding to withdraw the "Uniform Work-
141 ing Agreement"? A. I won't say that that was not a part of the consideration, but the basic consideration was the dispute as to whether or not it was in effect.

Q. Now, Mr. Wyckoff, if for any reason you were unable to—if you were enjoined from operating under the November 2nd, '59 amendment to the basic working agreements and the basic working agreemnts themselves, would you revert to some sort of emergency condition? A. If we were enjoined from working under any agreements, I suppose we would have a free hand to do as we pleased. I can't reconcile that such a situation could occur.

Q. The question was badly phrased.

If you were for any reason prevented from operating under the November 2nd, 1959, amendments to the basic agreements and were required to revert to the basic agreements as they stood prior to that amendment, would you continue to operate under the basic agreements? A. The basic agreements would remain in effect.

Q. Would you continue to operate under them? A. We would be forced to deviate from them because of the shortage of manpower, until such time as the strike ends.

Q. Would you re-adopt the "Conditions of Employment"? A. We would be forced to in order to serve the public.

142 Q. Mr. Wyckoff, with respect to your operating crafts or classes at the present time and recognizing that you are operating under the agreements as amended by the November 2nd, 1959, amendments, do you face any difficulty in carrying on your operation as— A. We don't have a surplus of men. I'll put it that way, if that's what your question is directed to.

Q. As the—as your operation—are you familiar with the operations of the carrier? A. Yes, I am.

Q. As your operations are being conducted today, do you have a sufficient force to operate your trains? A. We have sufficient force to comply with the rules, as they are amended by the 1959 notice. Now, there may be some infraction of the rules. That will be, of course, a minor dispute.

To the best of our ability, we are complying with those rules, as amended.

Q. How many employees do you require to—how many operating employees do you require to maintain your present level of service? A. I don't have the exact figures with me. We have sufficient manpower now to maintain the present level of service under the rules as they have been amended.

143 Q. Could you state that present level in terms of percentage of your freight capacity? A. The number of employees that we have now?

Q. No, could you state the present level of service in the terms of percentage of your freight capacity? A. I would say that we are operating at approximately 95 percent of the capacity that was operated at prior to the time of the strike.

Now, with respect to car-load freight, in many instances it's much more than we handled before the strike.

Q. Have you had any difficulty in recruiting employees? A. We haven't had difficulty recruiting employees. It takes time to train them, though.

Q. Well, from the standpoint of a long-range program, are your personnel requirements satisfactory now? A. Yes. We have a satisfactory number of applicants and we train them as we employ them.

Q. So that would you say that your present operating situation is an emergency situation? A. I wouldn't say it was an emergency situation at this date with respect to freight service, no.

Q. Now, with respect to your operating employees, are the "Conditions of Employment" substantially similar to

the proposal of September 25, 1963? I can show you
144 both of the documents, if you wish to compare them.

A. There's a similarity, marked similarity, between the two. The uniform agreement was modified to present language in the form of a working agreement.

Q. You say the uniform agreement was modified to present language in the form of a working agreement? A. That's correct.

Q. You mean, first came the uniform working—no, I don't understand your answer, sir. Let me— A. The "Conditions of Employment", as I told you before, were formulated to cover conditions that arose as a result of the strike. Subsequent to that time, a notice was served of a desire to enter into a uniform working agreement.

Now, the proposal was so worded to conform to the format of a working agreement. The "Conditions of Employment" were not.

Q. Leaving out the formality of wording and turning to the rates of pay, rules and working conditions in the "Conditions of Employment" and the rates of pay, rules and working conditions in the September 25 notice, are they substantially similar as applied to the operating crafts or classes? A. I would say substantially, yes.

145 Q. Are there differences? A. There may be minor differences. I would have to compare them to point those out.

Q. Would you like to skim these briefly to point out the differences which you think are at all significant? A. Well, for one thing, the "Conditions of Employment" apply to all of the employees, operating and non-operating.

The uniform agreement applied only, in this case, to the operating crafts, in this that you showed me here. The others applied only to the non-operating crafts.

Therefore, there were certain rules in the non-operating agreement that did not or were not set forth in the "Conditions of Employment". In other words, there were no similar conditions in the "Conditions of Employment".

Q. Now, with respect for the moment to the operating crafts or classes and ignoring the portion of the "Conditions of Employment" that are exclusive to the non-operating crafts or classes, if there are any, what significant differences are there between the two documents? A. Well, the agreement contains a preamble that the "Conditions of Employment" does not.

There is a provision in the proposed uniform agreement covering what will govern in the case of work stop-
146 pages. That is not present in the "Conditions of Employment."

There is a provision for representation in the uniform agreement.

Q. Now, in what respect is representation? What does that mean? A. It says:

"'Duly accredited representative' or 'accredited representative' as used in this agreement shall be understood to mean the regularly constituted committee, or officers of organizations parties to this agreement."

Q. Thank you. A. There is a provision covering issuance of free transportation to employees and their dependents.

Q. Is that in the permanent— A. That's in the agreement, in the proposed agreement. It's not contained in the "Conditions of Employment".

There is another provision with respect to physical examination that is contained in the "Uniform Working Agreement".

There is a retirement rule provision that is contained in the "Uniform Working Agreement".

There is a rule covering health and welfare
147 benefits for employees that's contained in the "Uniform Agreement".

There are articles pertaining to electric lanterns, to held-away-from-home terminal time, to calling of crews, to uniforms for employees that perform service requiring wearing of uniforms. Those are not contained in the "Conditions of Employment".

Basically, those are the deviations and there are quite a few changes in language.

Q. Now, with respect to the matter of classification of job rates—of jobs and rates of pay, I take it that the two agreements are substantially similar; is that right? As applied to the operating crafts or classes? A. That's correct.

Q. And with respect to seniority? A. Basically, yes.

Q. Leaves of absence? A. Yes.

Q. Of bulleting procedures? A. Yes.

Q. Basis of pay? A. As I told you, all the rest of the articles are basically the same. There are differences of wording, but basically they are the same.

Q. Well, just to go through the rest of these then,
148 we cover—I would like to go through them item by item, just to make the record, Mr. Wyckoff. A. All right.

Q. Reduction in force? A. I believe it's basically the same.

Q. Beginning of day? A. Yes.

Q. Recalling for service? A. Yes.

Q. Exercising seniority? A. It's basically the same.

Q. Starting time? A. Basically the same.

Q. Discipline procedures? A. (No response)

Q. Would you like to examine the documents? A. No, that's all right. (Examining instrument) That's basically the same.

Q. You are reading from a document you brought with you? A. I have a reproduction of the non-operating crafts—

Q. I see. A. —uniform agreement.

149 Q. Investigations? A. That's basically the same.

Now, you must understand, Mr. Shapiro, we are dealing with three—four separate organizations in—

Q. Yes, I'm reading from "Conditions of Employment" in calling off these items, you understand? A. Yes.

Q. Now, I think you testified that free transportation

was covered in the permanent September 25 proposal, which of course you've got in effect, but it was not covered in the "Conditions of Employment"? A. I believe that there is a deviation. I think it's covered for dependents also in the—

Q. Permanent? A. —uniform agreement.

Q. But it is covered with some additions? A. I think so.

Q. Vacations? A. Yes, the same.

Q. Vacation pay? A. Basically the same.

Q. Holiday pay? A. Basically the same.

Q. And new employees? A. Basically the same.

150 Q. Now, for the operating crafts or classes, more than one class of service? A. I don't think there is a counterpart to that in the "Conditions of Employment".

Q. What does that mean? "More than one class of service"? A. Well, a train crew could start a trip performing freight service and finish the trip performing passenger service. They would be performing two classes of service.

Q. I see. You have no passenger service at the present time, I believe? A. That's correct.

I don't see a counterpart in the "Conditions of Employment".

Q. No counterpart to "more than one class"? A. More than one class of service.

Q. You have an article listed as Item O-I. A. That says any employee may perform all services for which he is qualified.

Q. Would you like to read this item? (Indicating) A. Yes. It is basically the same as that contained in the executed agreement.

Q. It is the same? A. Yes.

151 Q. Calling crews? Held away from home terminal time; is that the same? A. I don't think that's in the "Conditions of Employment". I would have to check to be sure.

Q. I'm reading from it. A. Well then, it is.

Q. (Indicating to witness) A. Yes, it is basically the same.

Q. And going down the remainder—the remaining items: Calling crews? A. Basically the same.

Q. Crews called and not used? I think that's listed as "Called and not used". A. That's basically the same.

Q. Deadheading? A. Basically the same.

Q. What is "deadheading", sir? A. That's where you send a man on a trip to another terminal to return in service. And if he deadheads under orders and instructions from the Railroad, he is paid for riding.

Q. What do you mean when he "deadheads"? A. He doesn't perform service as such. In other words, he is not operating the train. He is just riding on
152 the train.

Q. Extra board employees? A. Basically the same.

Q. Meal periods? A. The same.

Q. The items—so that the only items that are different in the permanent agreement and the temporary "Conditions of Employment" which were in effect were the preamble, work stoppage, representation, physical examination, retirement, health and welfare, electric lanterns and the uniforms of employees? A. I believe that's correct, yes, sir.

Q. And as to the other items—free transportation, you mentioned that that was modified? A. That's right.

Q. Held away from home time was the same, and calling the crews was the same? A. Yes.

Mr. Shapiro: I plan to turn to the non-operating side, Your Honor. Perhaps—

The Court: Perhaps it's a good place to break off. I was hoping you could finish your side but you are
153 going to the non-operating side for awhile?

Mr. Shapiro: Yes, sir.

The Court: I imagine everybody would appreciate an opportunity to get a little lunch and refresh yourselves.

You have some papers to examine at lunch time, too, haven't you?

Would you be prepared to go ahead at 2:30? It's now 1:20. Is that all right with everybody?

2:30 this afternoon.

(Thereupon, at 1:20 o'clock p.m., on Tuesday, May 26, 1964, the Court adjourned to be reconvened at 2:30 o'clock p.m. of the same day.

At 2:30 o'clock p.m., on Tuesday, May 26, 1964, pursuant to adjournment of the preceding session, Court reconvened and the following further proceedings were had:

The Court: Suppose you come back to the stand, please.

Raymond W. Wyckoff

resumed the witness stand and further testified as follows:

154 The Court: You may proceed, Mr. Shapiro.
Mr. Shapiro: Thank you, Your Honor.

Direct Examination (Continued)

By Mr. Shapiro:

Q. Mr. Wyckoff, I think it has been previously established that the changes of September 24, 1963, as applied to the non-operating organizations were put into effect by the carrier on October 30, 1963; is that right? A. That's correct.

Q. At the present time, the "Conditions of Employment" of September 1, 1963, are not in effect for the non-operating employees; is that correct? A. That's right. We are operating under the rules put in effect on October 30.

Q. Now, this morning in discussing the non-operating—I beg your pardon—in discussing the operating crafts or

classes, we referred to a document which each employee was required to sign when he went to work, during the period that the "Conditions" of September 1, 1963, the so-called "Conditions of Employment" were in effect. You recall that.

Did that same rule apply for the non-operating
155 personnel? A. Each employee entering the service during the period involved signed an acceptance of —receipt and acceptance of the "Conditions of Employment".

Q. In discussing the non-operating organizations—I beg your pardon, Mr. Wyckoff.

In discussing the operating crafts or classes this morning, it was testified that the "Uniform Working Agreement" of September 25, 1963, was substantially the same with specific omissions, which you enumerated as the "Conditions of Employment".

Now, is that also true for the "Uniform Working Agreement" of September 24, 1963, as applied to the non-operating organizations? A. That's correct, yes.

Q. Would it be correct to state, Mr. Wyckoff, that the "Conditions of Employment", as applied to all crafts and classes of the carrier, were divided so as to set up a "Uniform Working Agreement" for the operating crafts or classes, which is the agreement of September 25, 1963, and to set up a "Uniform Working Agreement" for the non-operating crafts or classes of September 24, 1963? A. I'm not quite sure I follow the question.

The "Conditions of Employment", as I said this
156 morning, were simply a formulation of the conditions that arose during the period of the strike.

Then, on September 24 and 25, notices were issued to the organizations of the desire to revise the working agreements, the duly negotiated agreements, to the extent set forth in those notices.

Now, those notices were divided between operating crafts and non-operating crafts.

Q. When you drafted the notice of September 24, 1963, I take it you incorporated substantial portions, in fact, almost all of the "Conditions of employment" of September 1, 1963 as they applied to non-operating crafts or classes; is that right? A. Basically, that's true.

As I told you this morning, we changed the wording to comply with the format of the working agreement.

Q. And the same thing was true, I take it, with respect to the operating crafts or classes? A. That's correct, with the exceptions I mentioned this morning.

Q. Now, you've already testified that the agreements, that the September 24, 1963, "Uniform Working Agreement", as applied to non-operating crafts or classes, is substantially the same as the "Conditions of Employment.

157 Could you compare this copy of the September 24, 1963, proposal and the "Conditions of Employment" and tell me if there are any significant differences thereon? I might say that this "Conditions of Employment" is not the one in the record. Would you like to have it?

(Obtaining exhibit from the Clerk and handing same to the witness)

Would it assist you if we went down specific items in the "Conditions of Employment" and call them off for you? A. I'll read each one as I go along and tell you, if I can, the changes in them.

Q. Fine. A. In the "Uniform Working Agreement", there is a preamble which is not present in the "Conditions of Employment".

Q. What does that preamble provide, Mr. Wyckoff? A. It states that:

"Except to the extent specifically restricted or limited by this Agreement the following rights of Management are possssed and shall be exercised exclusively and solely by the Florida East Coast Railway Company."

158 And it sets forth those rights and prerogatives of management.

Q. It's a reservation of certain matters; is that what it has the effect of being? A. That's correct.

Now, in the "Uniform Agreement" there is the added classification of Freight Accountant that doesn't appear in the "Conditions of Employment".

Q. Otherwise, as applied to the non-operating crafts or classes, are the classifications the same as in the agreement? A. I'm going through them, Mr. Shapiro.

Q. I'm sorry. Go ahead. A. There is the added classification of Junior Claim Clerk in the "Uniform Agreement" which does not appear in the "Conditions of Employment".

There is the added classification of Clerk in the "Uniform Agreement".

The rate for Baggage Clerks has been changed and the rate for Ticket Clerk has been changed.

There is the added classification of Key Punch Operator in the "Uniform Agreement".

There is the added classification of Utility Clerk.

159 There is the added classification of Crossing Watchman.

Those are the changes I see in the rates of pay.

Q. Yes, sir. A. The manner in which seniority is established has been changed.

Q. In what respect, sir? A. The "Conditions of Employment" provided that new employees would establish seniority as of the first date on which compensated service is performed.

Q. And what did the "Conditions of Employment" provide? A. That was the "Conditions of Employment".

The "Uniform Agreement" spells out that:

"Seniority date for new employees will be established as of the date of entering the service."

The Court: What's the difference?

The Witness: There could be a considerable difference.

The Court: The date you enter service and the first date paid for service?

160 The Witness: No, sir. A man may enter the service and take his examination to become qualified for a given type job and not perform compensated service for a period of day or weeks.

By Mr. Shapiro:

Q. Is that the only difference in the seniority provision? A. That's the only one I see thus far, Mr. Shapiro.

Q. All right. A. Now, the classifications used, modified to take care of the additions mentioned and the rates of pay, the additional classifications:

There is the added article with respect to work stoppage.

There is the added article for representation.

There is the added article for time limits for handling claims and grievances.

There is the added article for retirement.

An added article for health and welfare benefits.

An added article for electric lanterns.

The Court: Electric what?

The Witness: Lanterns.

161 There is an added article setting forth an exception to the basic day.

By Mr. Shapiro:

Q. What is that exception, sir? A. The article reads:

"When conditions beyond control of Management prevent employees from performing their normal duties, only the hours between the beginning and release from duty, exclusive of meal period, shall be paid for, with a minimum of two hours beginning allowed each employee who reports for duty."

Q. And does that include work stoppages? A. It could.

Q. I mean, it would be possible for you to negotiate a

provision in your collective bargaining agreement which would cover a strike-caused emergency? A. If an employee came to work and walked off the job, he certainly wouldn't be entitled to a full day's pay.

Q. That wasn't my question, sir.

My question was: It's possible for the carrier to propose a provision in the collective bargaining agreement which would cover emergencies created by strikes
162 and cover the manner in which the carrier may adjust its operations and handle its employees and employment relations? A. Uh-huh.

Q. Is that right? A. Well, this article could apply in such circumstances. For example, if the operating crafts were to go on strike and the management could not operate the railroad, then the non-operating employees could be sent home under this.

Q. Well, I— A. Principally it had to do with employees working outdoors in adverse weather conditions when they couldn't perform their work.

Q. Why don't you continue then with—I don't want to interrupt your examination of these documents. A. I think those are the basic changes, and many of the articles have changes in wording.

Q. Well then, with the exception of the items you have enumerated, the "Uniform Working Agreement" of September 24, 1963, for the non-operating personnel and the "Conditions of Employment" of September 1, 1963, are substantially the same; is that right? A. I think that's a fair statement, yes.

Q. Now, a moment ago I asked you whether the
163 carrier could negotiate proposed—to the labor organizations and negotiate under the processes of the Railway Labor Act a provision dealing with strike emergencies, and how it would handle its employment relations in such emergencies?

Mr. Devaney: Your Honor, I object.

I think this is totally immaterial as to what could be nego-

tiated in an agreement. I see no relationship to the present action whatever.

Mr. Shapiro: Your Honor, I think that it does go directly; as a factual matter, it goes directly to the witness' earlier testimony concerning the reasons for the temporary "Conditions of Employment".

I would like to demonstrate, if I may—

The Court: I'll permit the question and answer.

Go ahead and answer, please.

The Witness: I don't know of anything that can't be negotiated upon if the parties are willing to negotiate on those issues.

By Mr. Shapiro:

Q. Are you familiar in general with the terms of
164 the collective bargaining agreements for the several classes or crafts of employees of the Florida East Coast Railway Company? A. Yes, I am.

Q. Is there any provision that you can recall in any of those agreements which would authorize the establishment of the rates of pay, rules and working conditions expressed in your "Conditions of Employment" as a special emergency requirement resulting from a strike? A. I don't think it is spelled out in that language, no. But the employees certainly have a condition under the working agreement, too, to perform service.

Now, they didn't perform their service.

Q. Your answer, then, is that there is no such provision that you can recall in the agreement? A. I think I answered it the best I know how.

Q. Thank you.

Now, Mr. Wyckoff, if the Court were to enjoin the operation of the "Uniform Working Agreement" of September 24, 1963, would you revert to the "Conditions of Employment" of September 1, 1963? A. I'm not sure I follow the question.

Are you saying, if the Court were to find that the Sep-

tember 24 notice was not put into effect properly?

165 Q. Yes, if it were to enjoin— A. Then, what would we revert to?

Q. Yes. A. Obviously we would revert back to the last duly negotiated agreement, but we wouldn't be able to comply fully with those agreements because of the shortage of manpower.

Q. What would you operate under, Mr. Wyckoff? A. We would operate under those agreements to the extent possible, but we would be forced to deviate from the restrictive provisions, the featherbedding provisions of the agreements.

Q. What document, Mr. Wyckoff, would you look to find the rates of pay, rules and working conditions which you would apply to the employees on the job in the event that the September 24 "Uniform Working Agreement" were enjoined? A. We quite naturally would have to work under the conditions that were in effect during the period the "Conditions of Employment" were in effect.

Q. Then you would revert to the "Conditions of Employment" for operating purposes? A. As I have told you repeatedly, that is not a negotiated agreement.

166 Q. I understand. Subject to your qualification of what is in effect and what is not in effect, your actual operation would be under the "Conditions of Employment", would it not? A. Of necessity, we are certainly obligated to perform service to the public.

Q. Just answer the question, please, A. I'm trying to, Mr. Shapiro.

The Court: Well, you've made your position sufficiently clear in this respect without repeating it every time there is a question in that area.

You would revert to the "Conditions of Employment", as far as—

The Witness: As far as—excuse me.

The Court: —rates of pay, rules and working conditions?

The Witness: Your Honor, as far as an agreement is concerned, we would revert back to the negotiated agreement.

The Court: I'm talking about what the men would work under.

167 The Witness: Well, we would have to work in conformity with the conditions that grew up during the period of the strike and set forth—

The Court: And set forth in the "Conditions of Employment".

The Witness: —in the "Conditions of Employment", that's correct.

By Mr. Shapiro:

Q. Mr. Wyckoff, would your answers respecting the personnel situation of the railroad, as were given with respect to the operating employees this morning, apply to non-operating people as well?

Would you rather I develop the questions specifically? A. Well, I would like to know what answers you are speaking of.

Q. All right, I'll try to be more specific.

From the standpoint of a long-range program of employment capabilities under your present staffing arrangement, do you face an emergency situation of any kind? A. No. We have sufficient manpower to work under the October 30, 1963, agreement.

Q. And if you were required to revert—if you
168 were required to abandon the "Uniform Working Agreement" of September 23, 1963 and reverting your operation subject to your qualification to the "Conditions of Employment" of September 1, 1963, would you consider that an emergency situation? A. We could operate under the "Conditions of Employment", since they are quite comparable to the new rules.

Q. They are quite comparable to the new rules? A. With the exceptions that I developed before.

Q. Now, Mr. Wyckoff, you testified, I believe, that the "Conditions of Employment" were developed to meet the emergency; did you not? A. I said the conditions arose during the period of the emergency.

Q. Thank you, I stand corrected.

The conditions arose during the period of the emergency and this document, I take it, as an embodiment of the practices which you developed during the period of your emergency; it that right? A. Nothing more than reducing to writing those practices which developed.

Q. You changed the seniority rule, did you not,
169 Mr. Wyckoff? A. Yes, that's different than the rules that were in effect formerly.

Now, the rules that were in effect formerly were not changed as a result of the "Conditions of Employment" but as a result of the September 24 notice, which became effective October 30.

Q. Well, let's say you operated under a different seniority rule under the "Conditions of Employment", did you not? A. That's right.

Q. Now, what was the emergency situation which led you to change your seniority rule? A. The featherbedding rules of the various craft agreements, strict seniority lines. In fact, it even went farther than that. Some of the crafts had seniority districts and groups in the respective seniority districts and an employee of one group could not perform the work of an employee in another group, or the employee in one seniority district could not perform the work of another employee in another seniority district, or the employee represented by one organization could not perform the work of an employee represented by another organization.

Mr. Wyckoff, have you had any trouble recruiting
170 replacements? A. In the last several months, no. We have been able to recruit them. The training is the problem.

Q. Did you have any trouble recruiting them earlier,

say, in October, 1963? A. We didn't have a plentiful supply. They were becoming more available.

Q. Now, could you hire replacements to operate under the existing seniority rule? Leaving out the question of costs, could you hire replacements? A. We could hire any number of people but just having people doesn't mean anything. You have to train them.

Q. Was it a question of training which led you to abolish the seniority rule and substitute the seniority rule in the "Conditions of Employment"? A. Mr. Shapiro, the "Conditions of Employment" did not abolish the seniority rule.

Q. I understand. Which led—A. We deviated from the seniority rule, in effect.

Q. Was it training that led you to do this? A. It was a need to utilize the available work force to the greatest degree possible. That is what led to it.

Q. But you say you could have expanded your work force by hiring more replacements? A. I said we could hire any number of people. I said it took time to
171 train them.

Q. Is cost a factor in the hiring of replacements? A. Not at that time. We were hiring them and training them just as fast as we could.

Q. If you could have complied, could you have hired replacements complying with the existing seniority provisions? A. Now, what period of time are you speaking of, Mr. Shapiro?

Q. Well, let's take the period after September 1, 1963, when the "Conditions of Employment" were published. A. Yes.

Q. Could you have hired replacements in line with the existing seniority provisions? A. We were hiring and training just as fast as we could at that time. We did not have sufficient to comply with the seniority requirements of the working agreements.

Q. Your statement is that you couldn't hire enought personnel to comply? A. I didn't say that. I can go out

and hire any number of people, but just having manpower available isn't of any value to the railroad unless they are trained to perform some function.

Q. Mr. Wyckoff, did you—I shouldn't say "you"
172 —did the carrier abolish the non-operating positions in January of 1963? A. The organizations notified the carrier that they were going on a legal strike. They also issued strike calls to their employees stating therein that no employee that they represented would perform any service for the railroad. As a result, the carrier issued notices to the individuals that, if the strike began, one minute thereafter their jobs were abolished.

Q. And did you thereafter reestablish positions? A. On February the 3rd, we resumed a limited operation. And at that time we started re-bulletining jobs to the extent that we could utilize the people.

Q. To the extent that you could utilize the people? A. That's right. In other words, at that time, we were only operating one train in each direction. Now, we advertised sufficient non-operating jobs to take care of that operation. We got no bids.

Q. But you did find replacements after the negative result on the bids? A. We embarked upon a hiring and training program, yes.

Q. If cost had not been a consideration, could you have hired and trained and obtained a sufficient working
173 force complying with the collective bargaining agreement's seniority provisions? A. I would say no.

Q. What would be—A. We hired them and trained them just as fast as we could.

Q. What is it that would prevent you from complying with the collective bargaining agreement, the seniority provisions? A. When? Today?

Q. At this time. A. Because we have the other agreement in effect, the October 30 agreement. We are complying with those seniority provisions.

Q. I'm sorry. In my question I shouldn't say "at this time", meaning today, but between September 1, 1963,

let's say, and October 30, 1963? A. We didn't have sufficient manpower to comply with the various restrictions and regulations.

Q. But you could have operated on a reduced basis, I take it, if you tried to comply? A. Mr. Shapiro, we certainly have an obligation to perform to the greatest degree possible the service which the public needs require and is entitled to receive.

174 Q. You didn't answer my question. A. I thought I did.

Q. The question was: You could have operated on a reduced basis if you had complied, could you not? A. It would have been a very reduced basis and it would not have been fulfilling our obligation to the public.

Q. But you could have operated? A. On a very restricted basis, yes.

Q. Now, you reclassified jobs in the "Conditions of Employment", did you not? A. The "Conditions of Employment" set forth certain different classifications than those contained in the working agreements at the time, yes.

Q. What did that have to do with the emergency? A. They were consolidated jobs; jobs that performed functions formerly performed by several employees on more than one position.

Q. Do you have a provision in the "Conditions of Employment" relating to assignments? A. Yes, there is. You mean bulletining of positions?

Q. No, sir. Would you read the first item in the contents of the envelope. (Tendering to the witness) A. It states:

175 "Employees will be required to perform any work designated by their superiors for which they are qualified, titles or qualifications of employee's position in no way restricting such employee from performing any such work"—"any such service"—I'm sorry.

Q. Now, the purpose of this provision, I take it, was to make available each employee to do whatever was needed

to be done in the face of any given emergency; was it not? A. Well, the positions themselves were, in most cases or many cases, consolidated positions.

Q. I'm talking about the assignment provision you just read. That's what I'm talking about.

Now, if a person, while working on one of those so-called consolidated positions, was qualified to perform a given function on another position, he of course was obligated to perform it.

Q. But you also felt obliged to reclassify all the jobs; not all the jobs, but to set up a different classification of jobs. Is that right? A. The classification set forth in the "Conditions of Employment" is different than that set forth in the working agreement in effect.

176 Q. Now, you established the seniority listings.

Do you recall how this system of seniority listings—I believe the term is seniority roster—operated? A. There were master seniority classifications and sub-classifications.

Q. Did you change these classifications from the existing collective bargaining agreements? A. Once again, Mr. Shapiro, they are different than the existing collective bargaining agreements but this did not change the existing collective bargaining agreements.

Q. Why did you feel obliged to set up separate seniority rosters if this was just an emergency situation? A. In order to uniformly assign the employees as they made bids for positions.

Q. You changed the—the "Conditions of Employment" have a provision dealing with reduction in force, which which states that:

"When forces are reduced, fitness, ability and seniority will prevail."

Was this in accordance with the existing collective bargaining agreements? A. The existing collective

bargaining agreements have provisions somewhat comparable.

177 Q. Do they have provisions which turn on seniority alone or on fitness and ability as well? A. Most of them have a provision for both, seniority and fitness and ability.

Q. Do you recall any agreement which does contain such provision? A. Oh, the Supervisors' Agreement has such a provision. I believe the Clerks' Agreement has such a provision.

These are the agreements that were in effect prior to October 30.

Q. Now, do the shop crafts' provisions have such an agreement? A. You mean do the shop crafts' agreements have such a provision?

Q. Yes, I'm sorry. Do the shop crafts' agreements have such a provision? A. I would have to refer to the agreement.

Q. Is this agreement among the documents you brought with you under subpoena? A. Yes, it is.

Q. Would you find it? A. It will require taking these all out, Mr. Shapiro. They all look alike from the top.

Q. I have been handed a copy— A. Here it is.

178 (Indicating)

Q. Oh, you have it? Good. A. (Examining instrument)

Q. Mr. Wyckoff, to expedite matters— A. It is provided for by Rule 16, Reduction of Forces; it provides that seniority will prevail and that employees who are cut off will be permitted to displace junior employees; but of course, they couldn't make such displacement unless they were qualified.

Q. If they hold a job classification, I take it that establishes that they are qualified under the agreement? A. Yes.

Q. Since the provision— A. I would say it probably would, in most cases, yes.

Q. Now, who is the judge of fitness and ability under your "Conditions of Employment"? A. The Supervisor in charge.

Q. Of the railroad? A. Right.

Q. You have provisions in the "Conditions of Employment" dealing with vacations? A. Yes, we do.

Q. You changed those from the existing collective bargaining agreements. I take it those are different,
179 let's put it? A. They are different, that's correct.

Q. What is the emergency provision which required you to make the employment—the vacation provision different? A. Well, for one thing, the agreement contemplated different methods of computing qualifying service, which requires extensive accounting.

Q. And was it more convenient and inexpensive to do it without the necessity for the accounting? A. The "Conditions of Employment" simplified the manner in which the accounting will be kept in order to determine who is qualified for vacation and who is not.

Q. Now, Mr. Wyckoff, you have in your hand the socalled Shop Craft Agreement.

The Court: What kind of agreement?

Mr. Shapiro: The Shop Craft Agreement.

The Court: Yes, sir.

Mr. Shapiro: Perhaps we should single this item out and mark it as item 4.

180 The Clerk: C.

Mr. Shapiro: C. And it has already been received, I believe.

The Clerk: That's right.

Mr. Devaney: You are marking 4C the manila envelope containing everything else, the books?

The Court: No. 4 is the whole thing.

Mr. Devaney: All right.

The Court: And anything we pull out, we give it a letter.

Mr. Devaney: All right. 4C then.

(Thereupon, the referenced document was received and filed in evidence as Plaintiff's Exhibit 4C.)

By Mr. Shapiro:

Q. There is in that agreement a series of items entitled "Protection of Employees". These are listed in the index, the various pages of the agreement.

Are these safety provisions, Mr. Wyckoff? A. The best way to tell is to refer to them.

181 Rule 40 says:

"No employee will be required to work under a locomotive or car without properly protecting himself with prescribed signals."

Q. And that rule—I don't think we need to read the entire rule, but that's a safety rule.

Now, are there other safety rules in the agreement under the heading of "Protection of Employees"? A. Well, Rule 113, captioned "Protection for Welders".

Q. And what others are there, sir? A. 135 is captioned "Protection for Employees", but has to do with sheet metal workers.

Q. And what others? A. 153 is captioned "Protection for Car Repairmen".

Q. These are all safety provisions which are incorporated into the actual working agreement; is that right? A. That's right.

Q. And do you have any items of that nature in your "Conditions of Employment"? A. No, it isn't spelled out in the "Conditions of Employment".

Q. What was the emergency reason for not com-

182 plying with the protection provisions? A. I didn't say we didn't comply with the protective provisions. I said it simply wasn't set forth in the "Conditions of Employment".

Q. But aren't the "Conditions of Employment" the sole conditions under which an employee on duty works? A. Not the sole conditions, no.

Obviously, to provide safe equipment and a safe place to work is a responsibility of management.

Q. It's apparently a responsibility which was controlled by the collective bargaining agreement until the "Conditions of Employment" were applied to each employee; is that right? A. That's not correct, Mr. Shapiro.

Many agreements had no comparable provision whatsoever, but that doesn't mean that we can provide the employees with an unsafe place to work.

Q. Well, this may ultimately go to consequence, but the point is that you don't have any equivalent of that in your "Conditions of Employment", do you? A. That's correct.

Q. And that the "Conditions of Employment" are the exclusive items under which you work; isn't that right?

A. As I said before, they simply reduce to writing
183 the conditions which grew up during the period of the strike.

Now, certainly there are other things over and above those set forth which would apply, such as providing a safe place for the employees to work.

Q. Mr. Wyckoff, you changed the basis of pay from what was set forth in the agreements. What was the emergency requirement that led to that? A. Well, there again, when the strike first began, because it was difficult to secure employees, many of them that came to work were not interested in working on an hourly basis. They asked for some sort of indication as to how much they were going to receive by the week or the month. So, in those cases, we gave them a monthly rate.

Now, as manpower became a little more plentiful, we endeavored to get back to the hourly rates and, by September the 1st, we had restored a number of the positions on an hourly basis.

Now, we included in those hourly rates payment for the

holidays, seven paid holiday, as such. There again is a complicated arrangement under the old agreements for determining when an individual is qualified for holiday pay. He must, in some cases, perform service on eleven days in the thirty-day period preceding the holiday; be available the day before, the day after, and on the holiday—
184 things such as that.

We simply didn't have the manpower to maintain those sort of records so, to simplify it, we included in the basic rate an amount which would compensate for the seven holidays, as such.

Now, if the man worked on the holiday, he got an additional amount, he got time and a half for working.

Q. Could you have hired sufficient employees to keep your books to the extent that bookkeeping was a factor in your—again, in your non-compliance with the existing agreements, this difficulty could have been avoided? A. Obviously, Mr. Shapiro, you are not familiar with the various methods which are necessary to maintain records in order to enforce these various agreements. That one was just one of the few of the—one of the many, I should say, that are involved.

Now, you can go out and hire bookkeepers or you can go out and hire clerks, but they are not skilled or trained to maintain the records necessary under these agreements.

Q. Could you train them? A. Surely, you can train them but it takes time.

Q. At the present time, do you have sufficient trained personnel to carry out your operations? A. Under
185 the existing agreement, the October 30 agreement, yes.

Q. Could you have acquired by the present date and trained sufficient personnel to live under the agreements as they stood prior to October 30, 1963? A. I would say no, not in all cases.

Q. Could you do it in some cases? A. Perhaps in some classifications, yes. In others, no.

Q. What are the classifications in which you would not be able to do it? A. Well, the ones that require more extensive training—the timekeepers, for example, must be familiar with each of the agreements in order to know how to maintain his records.

Q. Did you make any effort to train timekeepers for that purpose? A. We did, during the period that the "Conditions of Employment" were in effect. We trained or endeavored to train some men for it. When the agreement was placed in effect on October 30, we utilized those men—one man, I should say, in a different field.

Q. What other classifications have you found it difficult to train people in? A. Well, all the skilled
186 classifications require time to train the men.

Q. Had you hired replacements in a sufficient number to operate under the existing bargaining—collective bargaining agreements, could you have had them trained by now? A. Are you speaking of the October 30 agreement?

Q. No, sir, after the strike began? A. Yes.

Q. And you began an effort to restore operation, had you gradually hired replacements in a sufficient number to restore operations, could you have trained a sufficient number to operate under the collective bargaining agreements? A. As of today, no.

Q. As of today, your answer is no? A. That's correct.

Q. Why couldn't you hire a sufficient number to train to carry on under the existing collective bargaining agreements? A. As I told you before, it's not a question of hiring individuals. You can hire practically any number of individuals you need but you can't train them.

Now, certain classifications require extensive training.

For example, a Section Foreman, you can't make a
187 Section Foreman overnight. It takes a prolonged period of time, I would say perhaps a year, in order to train a man from scratch to be a Section Foreman.

Q. How long has the strike been in effect now? A. Well, it's going on 18 months.

Q. And you had a year in which to train a Section Foreman? A. Well, Mr. Shapiro, you can't bring in a whole group of individuals and start training them all at one time.

The Court: Just answer the question, would you please. It would save a great deal of time.

The Witness: I'm trying to, Your Honor, but Mr. Shapiro seems to think—

The Court: He is asking you, had you had a year?

The Witness: We have had a year, yes.

The Court: All right. That's all you need to say.

The Florida East Coast has attorneys here that will argue this matter. We don't need the witnesses to argue it.

188 By Mr. Shapiro:

Q. Did you hire any railroad people? A. We hired a few.

Q. Where did the bulk of your replacements come from? A. They made applications, came in off the street.

Q. Were may of them railroad people? A. No. I would say few were railroad people.

Q. Did you train these non-railroad people into railroad people? A. Yes, we did. We are in the process of training many now.

Q. So that you could, by carrying this on, train up to a point where your replacements could operate under the collective bargaining agreements? A. After an extended period of time, yes.

Mr. Shapiro: I believe that this concludes the direct examination of Mr. Wyckoff.

The Court: Do you have any examination?

Mr. Milledge: Yes, sir. I don't think it will take but a few minutes.

189 The Court: All right. You may proceed.

Further Direct Examination

By Mr. Milledge:

Q. Mr. Wyckoff, this strike began over a Section 6 notice issued by the eleven non-operating unions; did it not? A. That, and a counter-proposal by the Railroad.

Q. Now, just prior to the strike, what was the situation as far as between the parties, the bargaining position? A. The railway had made a number of offers to the employees, most of which were in excess of what they were demanding, but because they would not deviate from the national pattern, they turned them down.

Q. So they had demanded a raise in pay of essentially 10.28? A. The demand was for 25¢.

Q. Well, your bargaining was that they had asked for an amount and you had offered an amount, but it wasn't satisfactory and they went out on strike; is that right? A. We offered an amount in excess of what they were agreeable to settling for on a national basis.

Q. Now, after they went out on strike, did you—I take it you did not implement your last offer? I mean,
190 you didn't— A. They never—

Q. You did not change the contract up? A. They never accepted the last offer. The last offer remained available for them to accept, until January 30th, a week following the strike.

Q. Right, but you don't take the position that the contracts were changed in any way? Nobody implemented any proposal or changed proposal or counter proposal? A. The contract was changed as a result of the September 24th notice.

Q. Right. But between January 23rd and September 24th, nobody changed the contract or proposed to change the contract? A. That's correct.

Q. Right. You never proposed to implement your so-called counter-proposal which you initially made? A. No, we did not.

Q. All right. Now, I believe we have three areas of dispute:

You've testified that the "Conditions of Employment" are now out the window, so to speak. You don't claim you are operating under them as regards anyone, ops or non-ops? A. That's correct.

191 Q. Now, you did have union shop agreements with all of your non-ops, did you not? A. That's correct.

Q. It was the same agreement, however, for all of them? A. All of the non-operating crafts were parties to the same agreement.

Q. And one operating craft was a party to that same agreement, but wasn't the Brotherhood of Railroad Trainmen a party to that same agreement? A. I don't believe so. I would have to check it to see.

No, they were not.

Q. They had a separate union shop agreement? A. That's right.

Q. In any event, you proposed, in July, to abolish the union shop agreement with the non-ops? A. That's right. And in addition to them, with several of the other crafts that are not considered non-ops.

Q. Right. And a conference was held on your proposal? A. No, it was not. The employees refused to discuss the proposal because the Court Reporter was present.

192 Q. Representatives of all the non-ops met you and they met at a certain place; is that correct? A. Yes. I agreed to meet with them at the Monson Motor Lodge for the purpose of discussing the agreement and proposed cancellation of agreements.

Q. Do you recall the date? Was that August 29? A. I believe that's correct.

Q. And then there was a disagreement over the Court Reporter; correct? A. They refused to discuss—enter into any discussion because the Court Reporter was there.

The Court: And you refused to dismiss the Court Reporter?

The Witness: That's correct.

The Court: All right. So there was a disagreement over the Court Reporter.

By Mr. Milledge:

Q. All right. And within ten days, on behalf of the non-ops, mediation was invoked? A. So the Mediation Board notified me, yes.

Q. All right. And you've taken—however, you took the position and have taken it ever since that, notwithstanding the invocation of the services that nonetheless, these
193 agreements were abolished? A. That's correct.

Q. Right. And so, of course you have refused to mediate the dispute with the National Mediation Board? A. Oh, no. The Mediation Board told me by letter that they had docketed the dispute and that they would send the Mediator to the property, consistent with other requirements.

Q. Then you wrote them and said that it was abolished? A. I wrote them and told them it was abolished, but I was perfectly agreeable to meeting with the Mediator. In fact, I have written to Mr. O'Neill to find out why a Mediator has not come on to the property.

Q. All right. But nonetheless, you've taken the position since that time that these union shop agreements do not exist? A. I take the position they have been cancelled, that's correct.

Q. All right. Now, you issued a notice on September 24 to the non-ops proposing this complete revision of all the non-ops' agreement? A. I served a Section 6 notice on September 24, yes.

Q. All right. And the same thing happened there as happened on the union shop agreement; is that cor-
194 rect? A. That's right. Contrary to their prior policy, they refused to —

Q. Well— A. —discuss with me the notice, because a Court Reporter was present.

Q. All right. And they invoked mediation within ten days; correct? A. That's what the Mediation Board notified me.

Q. All right. And you wrote the Mediation Board and said you felt that mediation wasn't proper; right? A. That's correct. I told them that—

Q. All right. A. —that the employees failed to discharge their duties under the Railway Labor Act, and therefore did not have the right to invoke mediation.

Q. Yes, sir. A. However, the Mediation Board then wrote me and said that they had considered my position and, notwithstanding my position, they would send a Mediator to the property.

Q. Now, the "Conditions of Employment" which you say went into effect on September 1, 1963, that applied to all crafts, operating and non-operating? A. I didn't say the "Conditions of Employment" went into effect September 1, 1963.

195 Q. Right. It doesn't bear a date? A. The formulation was issued on September 1st, but those conditions had grown up during the period of the strike.

Q. Now, let's get one thing clear:

You represent to the Court that September 1st was the day you started handing out this document? A. That's correct.

Q. Was it not about the first week of July, 1963, that you actually started handing out this document? A. No, that is not correct.

Q. Who printed the document, Mr. Wyckoff? A. It was typed in my office.

Q. And duplicated there also? A. That's correct.

Q. Then you have records to indicate that September 1 was the day? A. That's right.

Q. But, in any event, you say it didn't go into effect. It was just followed? A. It was simply a written formulation of the policies that were being followed because of the strike conditions.

Q. And as far as the non-ops are concerned, the rules, rates of pay and working conditions contained in that document are the same ones that are in effect today?

196 A. There are some deviations, as I explained before.

Q. So at least as far as the non-ops are concerned, we originally started with what, 17 agreements? I mean, at the time of the strike? A. That's correct.

Q. Right. And you've consolidated them into one package; and since September 1st, you've followed that, those rules, rates of pay and working conditions as far as they are concerned up to the present time? A. No, since October 30, we've followed those rules,—

Q. I'm not— A. —working conditions, and so forth.

Q. Well, they are the same? A. Up to October 30, we were simply following policies which had grown up during the period of the strike.

Q. But they happened to be the same? A. Theoretically the same.

Q. I'm not talking about theoretical. A. Fundamentally the same, yes.

Q. All right. And of course, it's quite clear that the 17 agreements are markedly dissimilar from the "Conditions of Employment" and the September 24 agreement? A. In some respects, they are; in some respects, they are not.

197 Q. They are not the same? A. As I say, in some respects. For example, your leaves of absence rules are basically the same as they are in the new agreement.

Q. Well, if you were going to operate by the old agreements, you wouldn't have put the new ones into practice. They have substantial material differences from the old agreements? A. That's correct.

Q. Right. Now, on the ops' side of this thing, you've been operating under this "Conditions of Employment"—and I mean operating, I'm not talking about the theoretical now—up to what point? A. February 25, we put into effect the 1959 revisions of the working agreements. And

following that time, we have complied with the '59 revisions.

Q. Now, you testified here on February 28, in the Trainmen case and we had a long discussion then, about why it was necessary for you to operate under the "Conditions of Employment", and you told the Court then, gave some attempted justification as to why you were operating under the "Conditions of Employment" at that time.

Did you not tell the Court in the Trainmen case, on February 28, that you were operating then under
198 the "Conditions of Employment"? A. I believe that I told him that the employees had been paid up to that time under the "Conditions of Employment".

Now, the next pay period following the day I testified in Court was March 15.

Q. You didn't tell the Court you were operating under the '59 notice then, on the 28th? A. I don't think that question was asked me.

The Court: Well, it's asked you now.

You didn't say so, did you.

The Witness: Not to my knowledge, no, sir.

Mr. Milledge: Now, back last—

The Court: The only thing, Mr. Milledge, if there is any question about the testimony that Mr. Wyckoff gave before me on February 28 or whatever the date was in the Trainmen case, I think you better send for the file and read it and refresh his answer, if you want to nail it down. That's a little—

Mr. Milledge: All right.

199 The Court: Do you have it there before you?

Mr. Milledge: I have it in the form in which it went up to the Court of Appeals on my pagination.

The Court: Well, if the other side has it by the same pages, I would think that would be sufficient. All the testimony went up, didn't it?

Mr. Milledge: All the testimony given before Your Honor went up.

The Court: The printed pages are different from the pages of the Reporter?

Mr. Milledge: That's the only difference.

Mr. Devaney: Your Honor, there is no difference. Both pages are given.

The Court: Sir?

200 Mr. Devaney: I say, there are no differences because both pages are given, if Mr. Milledge wants to read through the pages of the transcript.

The Court: I just wanted him to read from it so you could refer to it and check them.

Mr. Milledge: Mr. Devaney, I'm on page 144 of the printed transcript, on the bottom, the last question and answer; the last question on page 144.

Mr. Devaney: May I say, Your Honor, for the record, that the transcript number, page 68, as shown in the printed record; apparently now the small number on the left-hand side of each one of these pages indicates the original transcript page.

Mr. Milledge: Oh, yes. It is 68 of the way Mr. Sheridan typed it up.

By Mr. Milledge:

Q. I asked you the question, Mr. Wyckoff:

"What are you doing that's under the old contract? Are you doing anything that's under the old contract?

201 Name me, sir, one thing that you are doing that's under the old contract and not under your new 'Conditions of Employment' which are the same as your '63 Notice?"

And your answer was not that you weren't operating under the '63 Notice, the "Conditions of Employment", but your answer was:

"Anything that we can do with the manpower we have available, we do under the 1949 contract."

A. I think I also stated, Mr. Milledge, that Mr. Van Arsdall had been notified that the '59 rules had been placed into effect.

Q. Of course, we know, don't we, Mr. Devaney, when you say "in effect", you don't mean in practice, do you? A. Are you speaking to Mr. Devaney?

Q. Excuse me, Mr. Wyckoff.

When you use the words "in effect", you don't mean it—you mean a change in the contract? A. That's correct. When you place into effect a change—

Q. Right. A. —it changes the contract.

Q. All right. But that, in your terminology,
202 that's not the same as what you actually do? It may or may not be? A. Well, you work under it to the fullest extent possible with the manpower available.

Q. We are just going back to words.

When you say "in effect", do you mean that always—do you always mean that's what you are actually doing?

The Court: When you say "in effect", you don't mean in practice, at least not necessarily?

The Witness: That's correct.

The Court: All right.

The Witness: When you place into effect a change, it changes the contract.

By Mr. Milledge:

Q. Now, back in the Government's suit last December, you were asked there what rules—back last December, under what rules were the people actually operating the trains. What were they working under?

Mr. Devaney: Your Honor, I object again. I
203 think this has all been gone into. It seems to me totally cumulative. Mr. Shapiro has gone into this question and I don't see any purpose in going over and over the same grounds again.

The Court: I can't tell whether this is the same ground Mr. Shapiro went over or not.

If you would refer to a particular question and answer in that other transcript, if it has already been brought out

by Mr. Shapiro, I don't see any reason to bring it out again. If it's another question and answer, then I—

Mr. Milledge: All right, sir.

The Court: You may examine him about it.

By Mr. Milledge:

Q. I will just show you this part of the excerpt, and if you would just read that for just a second.

Mr. Devaney: Your Honor, may I ask again that Mr. Milledge direct us to the part of the transcript he is referring to?

204 The Court: Well, I have a copy of the printed brief, the appellee's printed brief before the Court of Appeals, and I think you've shown him—

Mr. Milledge: Page 11.

The Court: Page 11 or page 7?

The Witness: Page 11, Your Honor.

The Court: Page 11; well—

The Witness: This is the portion that Mr. Shapiro referred me to this morning.

The Court: That's the same?

The Witness: Yes.

By Mr. Milledge:

Q. And what you testified there was that the people actually operating your trains were being worked under the duly negotiated contracts. That's what you told him? A. To the extent possible with the manpower available, that's correct.

205 Q. But they were actually being worked and paid under the "Conditions of Employment"? A. The "Conditions of Employment" were the policies that resulted from the shortage of manpower.

Q. Now, you tell us now that on February 28, the day that you gave testimony here last time, that these people were actually being worked under the '49 notices amended by the '59 notice? A. That's correct. And they were paid accordingly.

Q. All right. Now, I refer you to the transcript of your testimony the last time you were here, on February 28, which is page 136 of the printed record, on page 51 of the typed transcript of the hearing.

The question was asked:

"So you have been operating under"—

that's different than "in effect" now—

"So you have been operating under the 'Conditions of Employment', this document E, since September 1st, 1963, right on; is that correct?"

"Answer: That is correct, because of the fact that we had to provide service to the public and didn't have sufficient men to do it under the old agreement."

206 So last time you were here, you told us you were under the "Conditions of Employment". Now you say you really had done away with it by that time? A. Mr. Milledge, you construe a different intent from that remark than I intended by it. It certainly doesn't say what you say.

Q. All right. Maybe we can have one agreement on this thing.

Back last December, you didn't tell Judge Simpson that you were operating under the "Conditions of Employment". Whether you were asked it or not, you didn't tell Judge Simpson that you were operating under it? Whether you were asked it or not, is not part of my question; but that didn't come out, did it? A. I can't recall this date whether it did or not, Mr. Milledge. Whatever I told was the truth last December or any other time.

Q. And on—but you say you were in December last year, you were operating under the "Conditions of Employment"? A. That's correct.

Q. And you say that on February 28th, you weren't operating under them? A. Starting February 25th, we revised the '49 rules for Trainmen and the other

207 rules for the other operating crafts to conform to the '59 notice and—

Q. But as the testimony came to Judge Simpson last time, your testimony was that you were operating under the "Conditions of Employment"? A. I made no such statement that I can recall, Mr. Milledge.

The Court: He just read it to you.

By Mr. Milledge:

Q. All right. Now, there is just one other thing:

This item that you wrote on March 9, 1964, to Mr. Kitt, Mr. Bolin—which is the Plaintiff's Exhibit No. 7—also to Mr. Lemmon, this is the document by which you, as far as those three organizations go, by which you abandoned this September 25, 1963, notice; is that correct? A. We withdrew it.

Q. All right. Well, you abandoned it. It's a dead issue now, as far as those three organizations are concerned? A. That's correct.

Q. You had purported to put that notice into effect on November 4, 1963; had you not? The '63 notice? A. We contended it was, yes.

Q. That was the same as the "Conditions of Em-
208 ployment" for practical purposes? A. Fundamentally, yes.

Q. So, as a matter of actual fact, you operated, at least as far as those three operating organizations are concerned, under the same rates of pay, rules and working conditions which are essentially the same under the September '63 notice and the "Conditions of Employment"? As far as those three organizations are concerned, you operated under those rules, rates of pay and working conditions up to March 9; did you not? A. We contended those rules were placed into effect. The organizations disagreed with us and, on March 9, we withdrew them.

Q. The question was "operated", because we seem to have a little difficulty with the words "in effect".

You operated that way up to March 9, as far as those three organizations are concerned? A. That's correct.

Q. Now, is— A. Let's say up to March 9, you say; February 25th, we put into effect for them also, as well as the Trainmen.

Q. Let's abandon— A. The old rules—

Q. Let's abandon "in effect" and just talk about
209 "operate", because what we conceive we are concerned with here what people actually work under, and my questions are directed to what people are actually doing on your property. A. All right. On February 25th, for all the operating crafts, we adopted the '59 rules. The jobs were advertised in compliance with the '59 rules. We paid in compliance with the '59 rules.

Q. You go—On March 9th, did you go back and pay people the difference between the 25th and the 9th? A. We started paying people on February 25th in conformity with the '59 rules. Now, the first paycheck they received covering such allowances was on March 15.

Q. Yes, sir.

Mr. Milledge: That's all we have, Your Honor.

The Court: Mr. Devaney.

Mr. Devaney: Your Honor, first of all, since Mr. Milledge has read from page 51 of the transcript of the hearing; at page 136 of the joint appendix, an excerpt, I would like to call attention of the Court to the preceding—

210 The Court: Go ahead and read it into the record; it's all right.

Mr. Devaney: On page 51 of the transcript, immediately preceding the question Mr. Milledge read, there is:

"(Mr. Milledge conferring with the Clerk out of the hearing of the Reporter.)"

Then, Mr. Milledge:

"We will mark this C. C is the notice of July 31st, 1963.

"The Court: That looks awful black.

Is it legible?

"Mr. Milledge: The front side is fine, Judge.

"The Court: All right.

"Mr. Milledge: I just have a cheap photocopy process."

Then comes the question which he read:

"So you have been operating under the 'Conditions of Employment', this document E, since September 1st, 1963, right, on; is that correct?"

The answer was:

"That is correct, because of the fact that we had
211 to provide service to the public and didn't have sufficient men to do it under the old agreement."

Now, following this, page 53, Mr. Milledge again said:

"Now, you, in February—February 24, 1964, just this week after this law suit was filed, you purported to issue notice to Mr. Van Arsdall, the General Chairman of the plaintiff, that you have now decided that you are going to put the 1959 notice into effect; is that correct?

"Answer: We withdrew the withdrawal of the rules which were made effective several months ago, that's correct.

"Question: And is this a photocopy of your letter of this week which you proposed to put the '59 notice into effect? (Indicating)

"Answer: That's correct. That's a notification to Mr. Van Arsdall.

"Question: And the attachment to it is what you propose to put into effect?

"Answer: That's correct.

212 "Mr. Milledge: We will ask that this be marked.

"The Clerk: I.

"Mr. Milledge: Exhibit I.

"Mr. Devaney: No objection."

Now, there are other references which could be made, Your Honor, but I merely call this to the attention of the Clerk—I mean of the Court that the inference which Mr. Milledge draws is improper and I think that there is no basis from the transcript of the hearing that was before you that would indicate that there is any proper basis for the statement that Mr. Milledge has made.

Cross Examination

By Mr. Devaney:

Q. Now, Mr. Wyckoff, you have testified that prior to October 30, 1963, that the agreement in effect as to the non-operating unions was the agreement that existed before the strike began; is that correct? A. That's correct. There were several agreements.

Q. Several agreements? A. That's correct.

Q. Now, you have also testified that because of the strike, you were forced to make deviations from
213 those agreements in order to operate; is that correct? A. That's correct.

Q. Now, you have testified that, in doing this, the strike justified the action that you took; is that correct? A. Yes, it is.

Q. If you were not correct—

The Court: What is the purpose of this series of leading questions?

Mr. Devaney: I simply wanted to lay the foundation for the question that I have now.

The Court: I won't permit you to lead him in this fashion any longer. You will have to put your questions to him and let him make up his own answers.

By Mr. Devaney:

Q. Mr. Wyckoff, if you deviate from the agreements, is there a right to file claims under those agreements for the difference between the pay or the deviation between what you have done and what the agreemnt provided?

Mr. Milledge: Objection; leading and asking for a conclusion of the witness.

214 The Court: Objection sustained. I take it you don't contend otherwise?

Mr. Rutledge: No, we don't, Your Honor, that's a matter of law.

By Mr. Devaney:

Q. Mr. Wyckoff, have the unions filed any claims or grievances contending that you have not complied with the agreements since the strike began? A. No, except for matters of discipline.

Q. And what have those matters of discipline—what has this related to? A. Disciplinary action taken against employees who are on strike that committed acts against the known interests of the railway.

Q. Now, Mr. Wyckoff, when you first began operations on February 3rd, what employees were available to operate the railroad? A. Only supervisory or excepted employees.

Q. How soon after February 3rd, approximately, did you hire the first employee in the non-operating class? A. The exact date, I don't know offhand; it was the latter part of February.

Q. Now, since that time, have you had a program
215 of recruiting and training new employees? A. Yes, we have.

Q. Has that program continued to the present? A. Yes, we are hiring and training employees as expeditiously as possible.

Q. Now, approximately how many employees in the non-operating crafts do you have at the present time? A. In round figures, 400.

Q. And you have testified that the railroad is now performing approximately 95% of the volume of business that it performed before the strike? A. That's correct.

Q. Now, if you could operate only under the terms of the agreements that existed before the strike, how many employees would be required? A. Discounting the need for employees in passenger service or for less-than-carload freight, I estimate it would take another 600 employees in the non-operating fields.

Q. Now, at the rate that you have been able to recruit and train new employees, how long would it take before you

could recruit and train this additional number of employees?

Mr. Milledge: I object. It's just speculation.

216 The Court: I'll take the answer.

The Witness: It would take, I would say, at least a year and a half.

By Mr. Devaney:

Q. I'm sorry, I couldn't hear. A. It would take at least a year and a half. We have been operating now just about that long and we have 400 employees, so another 600 would take at least that long.

Q. Now, without the additional 600 employees, if you could only operate under the terms of the agreements that existed before the strike, could you continue to perform the same business or carry the same freight you now carry? A. No, we couldn't. It would have to be drastically reduced.

Q. Do you have any idea, what your estimation is, as to how much reduction would be required? A. I would estimate in the neighborhood of 50%.

Q. Now, Mr. Wyckoff, what occurred when you first began employing new employees after the strike, as far as the rates of pay that they were paid when they came to work for the Florida East Coast? A. Well, as the individuals made applications for employment, naturally one of

217 their first concerns was how much money were they going to make. And as a general rule, when it was expressed in dollars and cents per hour, they indicated a preference that it be on a weekly or a monthly basis so they would have some idea how much money they would have at the end of that period of time. They were not familiar with the railroad operations or the railroad's method of payment, and for that reason, I assume they wanted to know how much they would get a month.

Q. Now, did you agree to pay them by the month? A. Yes, we entered into such agreement.

Q. How did you arrive at the amount of the monthly rate? A. We attempted to convert the rates that would apply to the type of work that they were performing and, in many cases, it would be more than one specific class of work; tried to convert it to a monthly rate.

Q. Did you attempt to maintain the rate structure that had existed before the strike? A. We—

Mr. Shapiro: Objection, Your Honor. That's a leading question.

The Court: I didn't catch it, Mr. Shapiro. I didn't
218 catch your objection.

Mr. Shapiro: I object on the ground the question is leading.

The Court: It's all right; go ahead and answer.

The Witness: We attempted to maintain the rates that were in effect and simply converted them over to a monthly rate.

By Mr. Devaney:

Q. Did you find it necessary to make any other deviation in the payment of these employees, other than paying them on a monthly basis? A. Well, of course there were some people who returned to work who had been former employees. They came to work after the strike began and they requested that they also be paid on a monthly basis, expressing the opinion that it would give them some basis for returning to work; in other words, the job that they would come on would be a monthly or salaried job, as compared to the hourly-rated job that they had left. So in those cases where they indicated a preference, we went along with them also.

Q. Did you find it necessary to make any special payments to these people at this point that you had not
219 regularly made before the strike occurred? A. Yes, because of the extreme shortage of men, it was necessary in many cases to send them to points that were entirely unrelated to their homes, and in those cases, the

men requested some allowance for expenses and we entered into understandings with those people to provide them with expense money away from home. Of course, that's not entirely unrelated to normal conditions on the railroad before the strike where you might have a wreck and you send a crew out in emergencies to repair the track, and they would be paid expenses while away from home.

Q. Were there also instances before the strike, Mr. Wyckoff, in which the railroad furnished living quarters for employees? A. Yes, there were camp cars for the maintenance-of-way extra gangs. And there also was a wreck car or wreck cars that went along with the wreck train.

Q. Now, do you still pay this living expense allowance? A. No, we have been able to recruit sufficient personnel that we have been able to move the men closer to their homes and, in that manner, alleviate the necessity for such allowance.

Q. When did you begin the elimination of this
220 living cost or living allowance? A. Well, we tried to move the men closer as replacements became available for him at the point he was working. And I would say, oh, by August we had eliminated quite a bit of it.

Q. Did some still remain at the time the written "Conditions of Employment" were first distributed, on September 1st? A. Yes, there were a few cases that were still remaining.

Q. Was there any provision in the written "Conditions of Employment" for this? A. No, sir.

Q. But you did continue this after the so-called written "Conditions of Employment" were distributed? A. Wherever it was necessary, yes.

Q. Now, did you—did I understand earlier that you said that you began a movement from the salary back to the hourly rate of pay? When did this—when did you begin moving back toward the hourly rate of pay after February 3rd? A. Oh, I would say some time around April, as we started getting more people making applications.

Q. Now—

221 The Court: You are speaking of April, '63, now?

The Witness: That's correct, yes, sir.

By Mr. Devaney:

Q. Now, what relationship did the hourly rates bear to the rates that had existed in the agreements before the strike? A. Well, the rates that were set forth in the "Conditions of Employment" bore a close relationship to the rates that were in effect prior to the time of the strike. However, in many cases, there were varying rates for a specific type of job. For example, a stenographer in Miami in the freight office might get $20.00 a day, one at the yard office at Hialeah, just a few miles distant, $21.00 a day, one at West Palm Beach, $18.00 a day. So we took all of the various rates in that classification and averaged them, or consolidated them and took one average rate for that classification.

Then, in addition, we included—

Q. Might I ask you right at that point what was the reason for that, Mr. Wyckoff? A. To simplify the accounting procedures. There again, were were short manpower and we had to do everything possible to simplify those procedures.

222 Q. All right. Now, continue. Were there others?

A. In addition, we included in the basic rate an equivalent of the amount that the employees would receive for the seven paid holidays; in other words, holiday pay as as such and, if they worked on the holiday, they get time and a half for working.

Q. Were any of the hourly rates, Mr. Wycoff, discounting this allowance for the paid holidays and discounting for the moment this consolidation of such identical positions as that of a secretary where you use an average rate, were any of the other rates less than had been paid under the agreements that were in existence before the strike? A. I think possibly in one or two instances, there might be a reduction in rate, yes.

Q. Except for those, were the rates less than those in existence before the strike? A. No, they were not.

Q. Now, what were the one or two exceptions, if you recall, where the rates may have been less? A. Well, as I recall, the Supervisors in the Mechanical Department, the rates were reduced on those positions principally because the people that we got in certainly did not have the degree of experience to supervise in the manner that the employees who had left the service had supervised;
223 so the rates were adjusted in conformity.

Q. Now, do I understand that the salaries that you paid to employees bore the same relationship, except converted to a salary rather than an hourly basis; that your hourly rate bore to the rates that were in existence before the contract? A. That's correct.

Q. In other words, you attempted, as far as the rates were concerned, to maintain and not to change the rates of pay that had been paid before the strike began and after you began the service on February 3rd? A. That's correct.

Q. Now, these seniority districts: Does this mean a physical separation of some distance, Mr. Wyckoff? A. No, it's usually only a separation on paper. Two seniority districts could be involved in the some office.

Q. You mean in the same room? A. Same room. Two people could be sitting side-by-side, one working in a line of road seniority district, the other in a general office seniority district. They might do identical work but you couldn't give the employee on the line of road seniority district the general office work to perform or vice versa.

Q. Did this apply to the distinctions between the
224 various craft lines? A. That's also correct. You could have, oh, an electrician, for example, who is qualified to do welding. You may have one or two hours welding work to be performed, but you couldn't use that electrician to perform the work. You couldn't cross craft lines. You had to have a separate man on duty to perform that couple hours of work.

Q. Now, what occurred, Mr. Wyckoff, when the strike occurred? Did you have any of these employees left to perform service? A. No, all the employees working under the scope of the agreement were called out on strike by the organizations.

Q. Now, when you began operations how did you have to operate in order to perform the service? A. We had to use only supervisory personnel to perform work.

Q. Did supervisory personnel have to perform the bookkeeping or the welding or the shop work and track work? A. They performed all the work that was to be performed.

Q. Was it possible to observe with supervisory personnel the craft lines and the seniority districts that had been called for under the agreements that the unions had before they walked out on strike? A. No, it certainly
225 was not.

Q. Now, when you began hiring employees was it possible with the staff that you had to observe these craft lines and the seniority districts? A. No. There again, it was necessady to utilize each man to his fullest extent.

Q. Was this the—was this the primary distinction between your operation during the period of the strike and your operation before the strike occurred? A. That and in some instances, we had to contract out work which was not permissible under the agreements.

Q. You have—Are you still contracting out some work? A. Yes, we still have some contractors performing services.

Q. Are these contracts terminable at will? A. I'm not familiar with the terms of the contracts. Now some, I believe, have a 30-day cancellation clause; others, when the project is completed then, of course, the contract ends.

Q. Now, during any period of operations, Mr. Wyckoff, prior to this strike, were there occasions when the union or unions filed grievances claiming that you had violated the contracts? A. Well, after the strike began and I
226 issued—

Q. No. I'm saying before the strike. Let's forget this for a minute.

Before the strike, were there occasions when unions filed grievances claiming that you had violated the contract? A. Oh yes, many, many of them.

Q. Could the unions, Mr. Wyckoff, have filed grievances after the strike began? For violations of its contracts? A. Yes, sir—

Mr. Rutledge: Objection, Your Honor. This is the same question we objected to before.

The Court: Objection sustained.

Mr. Devaney: I have no further questions at this time, Your Honor, on cross.

The Court: Can the witness come down?

Mr. Milledge: I just want to ask one question, Your Honor.

The Court: All right.

227 Redirect Examination

By Mr. Milledge:

Q. You have appeared before the Defense Board, in October, the one that met over here at Cape Canaveral, or it may have been right here, but the Defense Board that the Secretary of Labor, and so forth, attended? A. I didn't testify before that Board, no.

Q. Mr. Thornton testified before the Board? A. Yes, he did.

Q. Did he not represent to that Board at that time that the railroad had restored 95% service in October? A. I'm not familiar at this time, or I can't recall at this time, just what the testimony was without reviewing it.

Q. You had resumed 95% of freight service by last October, had you not? A. There again, I'm not in position to answer. I can review—

Q. You have been answering—excuse me, go ahead. A. I can review the testimony and tell you the answer.

Q. You are in a position to testify today—

The Court: Are you asking him now what Mr. Thornton testified before the Defense Board or what the facts
228 were?

Mr. Milledge: No, what the facts were. He says he can't answer that, but he can answer it today. He says—

By Mr. Milledge:

Q. You say today you are doing 95% freight capacity? A. That's correct.

Q. But you don't know what—

The Court: What was the situation in October? Or to put it another way, when did you attain 95% of capacity?

The Witness: Your Honor, I'm not in a position to answer that right at the moment. I would have to check back on the records. But we are handling 95% now of the volume we handled before the strike.

The Court: You testified before me in December that you were up to 95% then; isn't that right, the 7th or 11th, whenever it was?

The Witness: I don't think I testified to that.

The Court: Well, maybe you heard Mr. Thornton
229 or somebody else say it; that's correct, is it?

The Witness: To the best of my recollection.

By Mr. Milledge:

Q. So, in other words, for quite a long time now, you have quit recruiting people— A. No.

Q. —because you've had the same level for six or eight months? A. No, we haven't quit recruiting people. We've been recruiting right along.

Mr. Milledge: All right.

Mr. Shapiro: Your Honor, I have just, I think—

The Court: I was just going to read him an answer of Mr. Thornton before the Federal Inquiry Board under the Department of Labor, and so forth, the October hearing, this Board of Mr. Reynolds, Mr. Hillman and Mr. Shul-

man, on page 153 at the bottom of the page, the answer of Mr. Thornton:

"Our freight train operation is now up to 95.53% of the cars that we are handling this month as compared to the number of cars we handled this time last month."

I think he probably meant last year.

"So we are getting up now in the freight train mileage almost comparable to the freight train mileage we had last year. To go into this area of our operation, to give you some indication, to show you how this service has been restored on the F.E.C. since the beginning of the strike, I have calculated the figures here which show the total number of cars handled each month as compared with the corresponding month last year. These are figures showing cars handled by each train and totalled monthly."

So actually you are more personnel and Mr. Thornton more operations, and he is more—

The Witness: That's right.

The Court: —familiar with this figure than you are, but you have no reason to doubt those figures that he gave at that time, do you?

The Witness: Not if they are reported there, no, sir.

Further Redirect Examination

By Mr. Shapiro:

Q. Mr. Wyckoff, after the strike on January 23, 1963, began, did you make an effort to recruit sufficient personnel to comply with the collective bargaining agreements? A. We have been recruiting personnel and training them just as fast as we can since the strike began.

Q. That's not the answer to the question, sir.

Did you recruit personnel in an attempt to comply with the collective bargaining agreements? A. In an attempt

to comply with the collective bargaining agreements and to provide service to the public which they require.

Q. Did you attempt to recruit personnel for the purpose of complying with the collective bargaining agreements? A. For both purposes.

Q. Now, the Court has read aloud the testimony of Mr. Thornton before the Federal Inquiry Board; the carrier had reached 95% of freight capacity by the time that the Federal Inquiry Board was held in October of 1963.

Mr. Devaney: Your Honor, may I again, I think
232 one point Mr. Shapiro has made is in error. He is talking about freight capacity and those figures are talking about numbers of cars handled. I don't know what the difference or where the difference lies, but there is a difference and I think that this probably needs to be cleared up.

The Court: Well, I think he used "capacity" loosely.

Mr. Shapiro: Yes, I did.

The Court: You are not talking about the capacity but, rather, a comparable tonnage and mileage one year as against the other, aren't you?

Mr. Shapiro: Yes, that was the intent. Actually, perhaps I should refine that term a little bit.

The Court: All right.

By Mr. Shapiro:

Q. To refine it then: The carrier was, according to the testimony we have just heard read into the record, the carrier was carrying 95%, moving 95% of the amount of freight that it had moved the previous year in October of 1963.

233 Now, how many employees did you have at that time, do you recall, in October of 1963? A. Mr. Shapiro, I'm not in a postion to answer that. I would have to check my records to find that out.

Q. You can't recall? A. (No response)

Q. Mr. Wyckoff, if you will bear with me just one mo-

ment, I'm going to try to locate something which may refresh your recollection.

Before the Federal Board of Inquiry, Mr. Thornton concluded his—Mr. Thornton testified as follows:

"The next portion I would like to cover is the portion I referred to a moment ago, our manpower requirements."

Now, let me interrupt there in my reading and ask you: Is Mr. Thornton the officer responsible for the personnel requirements on the railroad? A. Mr. Thornton at that time was Vice President and Chief Operating Officer, and he was responsible for operations.

Q. Did you furnish him information on manpower—for manpower staffing requirements? A. I furnished him with manpower and have been responsible for employing and having manpower trained.

Q. And in the course of carrying out your responsibilities, then you are familiar with the manpower requirements of the railroad? A. That's correct.

Q. So that if Mr. Thornton was testifying about manpower requirements, he was obviously testifying on the basis of information that you furnished him; is that right? A. That's correct.

Q. "The next portion"—this is Mr. Thornton's testimony before the Federal Board of Inquiry:

"The next portion I would like to cover is the portion I referred to a moment ago, our manpower requirements. At the outset of this work stoppage, we utilized primarily our supervisory personnel. As it became obvious to us that this work stoppage was going to be of prolonged duration, we made necessary arrangements and plans and executed these plans for recruiting personnel to continue the operation and restore it to full service in all respects. To do this, we are very proud of the qualifications that we have established for these new personnel. We have as of this time, in excess of 650 employees on the railroad whom we have recruited or who have ac-

tually returned to work since the work stoppage. Now, these employees are being very closely screened. We are screening them from the aspect of their personal references. We are screening them through our special services department as to any criminal record they may have, screening them as to any educational requirements. We are now employing only people with high school educations with lessons in lab class, whereas before they had grammar school. We are screening them as far as physical requirements are concerned. We have instituted a very thorough physical examination and have included back Xrays. I make the comment that we have been selective in our requirements. Of the 650 we have now, I would give you this as a conclusion. I can't give it to you exactly but

I would imagine we have over 1,000 applicants we
236 considered for employment and we have gone into
a good long-range program from the standpoint of employment capabilities. After these people have been actually employed, they are trained. We do not utilize these people on the job until they have been trained. This training is still going on."

Now then, there is a further question—I'm skipping some of this testimony. Or I would be willing to call Mr. Thornton for the purpose of developing this further—

The Court: Yes.

Mr. Shapiro: —with him. I'm skipping part of the testimony now, which appears incidentally, the document that we have been reading from is "Hearing before the Joint Federal Inquiry Board under the Chairmanship of the Department of Labor with the Department of Defense and the National Aeronautics and Space Agency participating", and it is dated Tuesday, October 1, 1963, and I have been reading starting at page 139.

Now, skipping a portion of this testimony, we have
237 a question from a member of the panel, Mr. Shulman:

"What did you consider a complete staff?"

Mr. Thornton: "Well, let me say this: Prior to the strike, we had approximately 2,000 employees. I do not anticipate that we would need anywhere near this amount because we've been able to eliminate to a very large degree the featherbedding that's been in the railroad industry." And there follows an example based on the requirements for trains.

By Mr. Shapiro:

Q. Now, does that refresh your recollection, Mr. Thornton, sufficiently for me to ask you whether you were making any attempt to recruit people for the purpose of complying with the collective bargaining agreements and to provide the service the public needs and demands?

Now, Mr. Wyckoff, you heard me read Mr. Thornton's response to Mr. Shulman's question, "What would you consider a complete staff?" Was there ever any intention of attempting to acquire again a complete staff so that you could operate with replacements? A. As I said
238 before, we have continued to recruit personnel and train them. Now—

Q. Would you please answer the question, sir? A. I was trying to.

We haven't reached a point where we have our positions all filled. We are continuing to recruit personnel.

Q. I asked what—did you have the intention of recruiting a sufficient number of replacements to bring your strength up to the requirements of the collective bargaining agreement? A. Yes. And of course, those requirements changed on October 30th.

Q. Your answer; this, of course, was as of the October requirement, Mr. Wyckoff? A. That's right.

Q. And now you state, your answer to my question is yes, you did intend to recruit up to the level required under the collective bargainig agreement? A. That's correct.

Q. Then you disagree with Mr. Thornton's statement

that "I do not anticipate that we would need anywhere near this amount", meaning 2,000 employees, "mainly because we've been able to eliminate to a very large degree
239 the featherbedding that's been in the railroad industry." A. We had already served the notice of September 24 by that time and we were optimistic that we would be able to negotiate an agreement on that and eliminate the featherbedding.

Q. Now, your temporary "Conditions of Employment" are, with the exception of the items you have previously enumerated in your testimony, substantially the same as the notice of September 24, 1963?

The Court: I'm sure you went over this.

Mr. Shapiro: Yes, Your Honor.

The Court: On your earlier examination. So did Mr. Milledge.

By Mr. Shapiro:

Q. You testified, sir, that if you were required to comply with the collective bargaining agreements, you would be compelled to reduce the service approximately 50%? A. That's correct.

Q. How do you reach this figure, sir? A. Well, we have, as I told Mr. Devaney, in the neighborhood of 400 non-operating scope employees working today. Prior to this strike in those classes, not including passenger or
240 LCL freight, in round figures there were a thousand; so that means we would need 600 additional people to comply with the requirements of the various agreements that were in effect prior to October 30.

Now, that's just about 50%.

Q. Now, as of October 1, 1963, Mr. Thornton testified that you established a long-range personnel program of which you were quite proud. Was this long-range personnel program which had been established conceived of for the purpose of complying with the collective bargaining

agreements? A. Yes, it was conceived of to provide the railway with manpower with which to operate and to operate under the agreements that were in effect.

Q. But you had changed your physical requirements, according to Mr. Thornton's testimony, had you not? A. As I said, we had served notice on September 24 of a desire to revise the agreements and we were optimistic that the notice would be consummated and the agreements would be consummated thereon in the not-very-distant future.

Q. But you had already gone into a good long-range program from the standpoint of employment capabilities on October 1, 1963, six days after your notice was served; had you not? A. We started in a long-range pro-
241 gram of hiring and training personnel in February of '63.

Q. So that your long-range program in February of '63, eight months before your notice of October—September 25, 1963, nine months before it, was really not directed at these collective bargaining agreements. It was directed at changing the collective bargaining agreements; is that right? A. Mr. Shapiro, the personnel we hired, we anticipated working under whatever collective bargaining agreements were in effect. Now, until such time as we had sufficient personnel to comply with the agreements, provisions that were in effect, we had to deviate from them.

Q. Now, you changed your educational requirements from what had existed previously; did you not? A. That's correct. I think that's a prerogative of management and has been—

The Court: Would you mind answering the question.

By Mr. Shapiro:

Q. Your long-range program stated:

"We are now employing only people with high school education."

I'm sorry—Mr. Thornton's testimony was:

"We are now employing only people with high
242 school education with lessons in lab Class, whereas before they had grammar school."

Was this a consequence of the emergency that you raised your educational requirements for hiring? A. Well, obviously we wanted only first class employees working.

Q. You could have—you had no difficulty in obtaining applicants, I take it? A. That's correct.

Q. You testified earlier that there was a time when there had been a smaller number of applicants. I may be putting words into your mouth; let me review this.

You testified that at one time you had difficulty recruiting personnel? A. In the early days of the strike, that's correct.

Q. Mr. Thornton's statement is that:

"We have over a thousand applicants we considered for employment."

This was at a time, according to the testimony, when you had 650 employees on the railroad.

I take it then that you really didn't have any difficulty at this time, in October of 1963, when Mr. Thornton tes-
243 tified, in obtaining applicants? A. We have many applicants but they didn't all meet our qualifications.

Q. But your qualifications aren't based on the collective bargaining—weren't based on the collective bargaining agreements, were they? A. I don't know of any requirement in the collective bargaining agreements with respect to qualifications for applicants.

Q. What you are telling me then is that you don't need to hire sufficient replacements to meet the collective bargaining agreements because you can alway raise your standards to a point where you can't find sufficient replacements to meet them; is that it? A. I didn't tell you that at all.

Certainly a requirement for a high school education for other than common labor is not excessive.

Q. Now, Mr. Wyckoff, have your personnel levels reached the permanent point under which you wished to operate at the present time? A. No. We are still recruiting and training today. I said that before.

Q. Are you recruiting and training for the purpose of increasing your work force or for the purpose of re-
244 placing turn-over? A. Increasing our work force.

Q. What is the approximate size of your work force today? A. We have approximately 850 employees.

Q. So that you have picked up 200 employees since October, when Mr. Thornton testified you had approximately 650? A. Well, that's right.

Q. Now, that's almost an increase—well, it's an increase of slightly less than a third again of your October work force, I believe, from 650 to 850, an increase of a third—in how many months? Eight months? A. Approximately.

Q. So that in the eighteen months of the strike, you've been able to recruit and train a work force of 850 employees; is that right? A. Well, Mr. Shapiro, it's not a static force. In other words, you constantly have replacements in addition to endeavoring to increase the force.

Q. Now, you are levelling off your work force, I take it? You were from February of 1963 to October of 1963, you had a force—you raised your force to 650. From October 1, 1963 to this month, you've increased it by 200, so that your rate of increase has slowed down; is that right,
245 sir? A. Well, of course, the more employees you have, the more turn-over you have; in other words, the more replacements you have to hire to maintain the equivalent and the additional for increasing the force.

Q. But your statement that it would take eight—you testified that it would take approximately eighteen months from now to acquire and train sufficient personnel to operate under the former collective bargaining agreements. It seems to be quite at variance with the fact that, in

nine months. you have been able to recruit a force of 650, which brings you to 95% of your previous freight.

I ask you whether, with this force of 650, you couldn't embark on a training program, if you so desired, to recruit, to train under the existing—under the former collective bargaining agreements a force sufficient to operate thereunder in accordance with the Act? A. I told you, Mr. Shapiro, we are recruiting and training every day. Now, we can't do more than that.

Q. You haven't answered the question. A. Yes, I have.

Q. I will try and repeat it, Mr. Wyckoff.

You have a force of 650—of 850 personnel at the present time who are operating 95% of your freight capacity,
246 and you are telling me that it would take you eighteen months to build—to train, to replace and train for the positions paid and maintained under the collective bargaining agreements as they stood prior to the September 24, 1963 implementations.

Now, I ask you, in light of what you have answered, whether that estimate is accurate? A. It might be very conservative. It might take longer than that. I gave an estimate to the best of my ability at this time. I estimate eighteen months; now, it may well take longer than that.

Q. If you raise your standards for hiring employees, can you stretch—does it make it more difficult to meet the requirements of the collective bargaing agreements? A. I don't quite follow you.

Certainly you don't expect the railroad to hire bums, people with police records or criminal records, and so forth, just for the sake of putting individuals on the payroll?

Q. I don't believe that was my question and I would appreciate it if you would not question me.

All right, prior to the time of the strike, according to Mr. Thornton's testimony, most of your employees had grammar school education. Let me refresh you on
247 it, if I may:

"We are now employing only people with high school education with lessons in lab class, whereas before they had grammar school."

Now, you were able to run a railroad with the people you had with the grammar school educations; were you not? A. Perhaps not as efficiently as it's being operated today.

Q. So that your interest here is in increasing your efficiency; is it not? A. Why certainly it is.

Q. And you prefer to operate under these "Conditions of Employment" rather than under the former agreements, which I think—well, is that correct? A. Mr. Shapiro, I don't know how to answer your question other than this:

We have ample applicants with high school education and that can meet our physical requirements to train just as quickly as we can train them.

Now, does that answer your question?

Q. The question is: Given a choice between the—the question was addressed to the railroad's preference.

248 You are interested in efficiency, which is very laudable.

Mr. Devaney: Your Honor, I object to this line of questioning. I think we've been patient. The fact that the railroad gave notice of its desire to put certain rules changes into effect, I think indicates that given its complete preference, of course it felt that these were superior to the rules that existed prior thereto.

I think this questioning—what the railroad preferred and what it wanted to do—I think we've really drug this through this proceeding long enough. I don't see that we're getting anywhere.

Mr. Shapiro: I think that Mr. Devaney's comment that, of course this is a matter of the railroad's preference, establishes the point which we considere relevant and that is that these changes which have been put into effect are not really a product of the emergency but are a product of the railroad's desire, which may be perfectly legitimate,

to rid itself of the provisions of the collective bargaining agreements which it feels are hampering its operations.

249 Now, those are the real objectives of these changes that have been put into effect. And our disagreement with this is not that they are to increase efficiency but that they have been done in violation of the Railway Labor Act's requirements.

Since Mr. Devaney has made my point, I think we needn't pursue the line further.

By Mr. Shapiro:

Q. One further question, Mr. Wyckoff, and I think we will at last be done.

In your experience as the Personnel Director of the Florida East Coast Railroad, have you ever seen a grievance procedure filed complaining that the carrier had put into operation a written revision of the terms, or any of its terms, on any of the collective bargaining agreements which are in force? A. I don't know about a written revision. I know there have been many grievances processed on the contention that the carrier has changed the method of application of agreement rules.

Mr. Shapiro: Thank you, Mr. Wyckoff.

I have nothing further, Your Honor.

250 Mr. Rutledge: We have nothing further, Your Honor.

Mr. Devaney: Nothing further, Your Honor.

The Court: Come down, Mr. Wyckoff.

The Witness: Thank you.

(Witness excused)

The Court: I would like to take a recess at this time, Gentlemen, until 9:30 tomorrow morning. I was hoping it could be finished today but I was a little optimistic.

Mr. Rutledge: Your Honor, may I bring one thing to your attention. One of the witnesses who was subpoenaed,

he was subpoenaed in the Court of Appeals, Mr. Van Arsdall of the Brotherhood of Railroad Trainmen, yesterday afternoon and he has received word that his wife is seriously ill in Miami.

The Court: He was subpoenaed in the Court of Appeals?

251 Mr. Rutledge: He was asked to come out of the Court of Appeals and served with a subpoena at that time.

The Court: Oh, I see. He was served at that time.

Mr. Rutledge: Yes.

The Court: And what now?

Mr. Rutledge: He has received word that his wife is seriously ill in Miami and he would like permission of the Court to go to Miami.

The Court: What is the gentleman's name?

Mr. Rutledge: Mr. Van Arsdall.

The Court: Can you spare him?

Mr. Devaney: Your Honor, we would be more than delighted to release Mr. Van Arsdall. We would like, however—

The Court: Is there some other Trainmen's representative that can be here in his place?

252 Mr. Rutledge: There are other Trainmen representatives here, yes, Your Honor.

Mr. Devaney: The only thing really we would have any reservation about are the records in Mr. Van Arsdall's possession. If somebody else has those, we have no objection to releasing Mr. Van Arsdall.

Mr. Milledge: Judge, this Mr. Van Arsdall was served in Jacksonville yesterday. He's from Miami, naturally, where all his records are, and not a one of his records is up here. He was served yesterday afternoon with this great big subpoena duces tecum; so natuarlly, he doesn't have anything because it's all in Miami. And there has been no mileage paid to send anybody down there with a van to bring it back.

Mr. Devaney: I don't think we're talking about a van, no matter what Mr. Milledge may say. All we have asked for are the records; so that if Mr. Van Arsdall can't make this arrangement, I have no objection to releasing him subject to his being available or that the records be available at a reasonable time.

253 The Court: Well, he hasn't got the records. The man who will be here tomorrow, you've got a man who will be here tomorrow with as much as he's got?

Mr. Milledge: Yes, sir.

The Court: As I understand, he was served after he came up here yesterday afternoon.

Mr. Milledge: Yes, sir. And we'll have another officer—

The Court: You will have another officer, as well off as he is. With that agreement, may the gentleman go to his sick wife?

Mr. Devaney: Certainly. We don't want to prevent that. All we want are the records.

The Court: In other words, I'm not exacting a stipulation that these records be here in the custody of some other man by reason of this request. You will have a man here that will have just as much as he would have.

254 All right. Thank you, Gentlemen.

(Thereupon, at 5:05 o'clock p.m., on Tuesday, May 26, 1964, the Court adjourned to be reconvened at 9:30 o'clock a.m., on Wednesday, May 27, 1964.)

255 Thereupon, at 9:30 o'clock a.m., on Wednesday, May 27, 1964, pursuant to adjournment of the preceding session, the Court reconvened and the following further proceedings were had:

The Court: Good morning, Gentlemen.

Mr. Milledge: Good morning, Judge.

Mr. Devaney: Your Honor, we would like to file at this time a Motion to Compel Answer, which is filed pursuant

to Rule 37(a), and this is in connection with the deposition of Mr. Eugene C. Thompson.

Secondly, it is a Motion for Production of Documents.

We can file these now, or would you rather we wait until the Government completes its case? We will act at the pleasure of the Court.

The Court: Let me see them.

(Clerk handing instruments to the Court)

The Court: I am inclined to think that it might be better to hold these until conclusion of the Government's case. He received copies of them. It looks like
256 it may take some time, some planning, and I think maybe we better go ahead at this moment.

Mr. Devaney: Very well.

The Court: You may proceed, Mr. Shapiro.

Mr. Shapiro: We would like to have Mr. Winfred Thornton called.

Winfred L. Thornton

having been produced and first duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Mr. Shapiro: Your Honor, the examination of Mr. Thornton will be conducted by Mr. Edelman.

By Mr. Edelman:

Q. For the record, sir, would you state your full name. A. Winfred L. Thornton.

Q. Are you an officer of the Florida East Coast Railway Company? A. I am.

Q. What position do you hold? A. I hold President.

257 Q. And what are your duties in that position?

A. Well, as general supervision of the operation of the railroad.

Q. When did you become President of the carrier? A. On the 14th of this month.

Q. And prior to that, what was your position? A. Vice President and Chief Operating Officer.

Q. How long did you hold that position? A. For approximately three years.

Q. And in that position, what were your duties? A. Well, more specifically in the transportation and maintenance and the operation of the railroad.

Q. So that you are familiar, are you not, with the operations of the Florida East Coast Railway since January, 1963, and in fact for some time prior to that? A. I am.

Q. At the present time, if you can tell me, what is the average daily freight income of the carrier? A. Well, I haven't got those figures with me.

Q. Can you tell me approximately? A. No, I really couldn't give you any estimate. It varies from day to day, depending on the day of the week; so I couldn't give you any figure on that.

Q. I show you—

258 The Court: You mean revenue, don't you?

Mr. Edelman: Yes, referring to revenue, Your Honor.

By Mr. Edelman:

Q. I show you a document entitled "Affidavit of Winfred L. Thornton". Can you tell me what that is? A. This is an affidavit that I prepared. It doesn't reproduce too well. Apparently in March, '64.

Q. And does that affidavit indicate anything concerning the daily revenue of the—I direct you to the second page and to— A. Paragraph 5 reads as follows:

"The railroad will suffer irreparable damage if required to reduce its services. It is estimated for the months of January and February, the railroad had an average daily freight income of $63,430. The traffic is reduced 43%. The

revenue will likewise be proportionately reduced. This will result in a daily loss of $27,259."

Q. That's a revenue figure; that's your receipts for the day, is it not? A. That was for the period mentioned there.

259 Q. Yes, but that's not a profit figure, is it? A. No. That was the income figure.

Q. Could you offer me any estimate at all, if the revenues were in the area of 60 to 65 thousand dollars, what the daily profits were?

Mr. Devaney: Your Honor, I object. I think this is totally immaterial to any inquiry here. If we are talking about reduction of business, that's one thing. We are not concerned here with the profit and I see—

The Court: Would you suggest what relevance this has?

Mr. Edelman: Your Honor, in talking about the injury to the carrier in having to reduce its service should the Court issue any order, it would seem to me that the relevant inquiry is not the reduction in volume, or at least not entirely the reduction in volume, but also what the financial impact on the carrier would be, which would be a profit impact.

The Court: Of course, first of all, Mr. Thornton is an operating officer and not an accounting officer. If it's really material to get figures of this kind, they

260 are filed monthly with the Interstate Commerce Commission, I believe, and they are available and can be put in with exactitude, or an accounting officer from the F.E.C. could be called here.

In the second place, the harm that may result from substantial reduction of this carrier's ability to operate—to offer service, that harm is by no means limited to the impact revenuewise on the carrier. The public interest is—

Mr. Edelman: Oh, yes.

The Court: There are a great many other features of it.

Mr. Edelman: Yes, sir, I appreciate that.

The Court: In other words, if they were required to cut their service in half by reason of going back to these old agreements, there would be many other harmful effects other than the loss of revenue to the—and the loss of income to the carrier. There are many other effects involved.

Mr. Edelman: I was only directing myself to that
261 one aspect of the changes which would occur if the carrier cut back its operation. However, we have distinguished that Mr. Thornton's affidavit did refer to receipts and not to profits, which was the main thing I was getting at.

The Court: Yes, sir.

By Mr. Edelman:

Q. At what percentage of capacity approximately, Mr. Thornton—this is an operation-kind of figure—would you say that you are now operating. Let me make that more specifically:

In terms of what the road carried for a comparable part-time of the year during a non-strike situation, what percentage are you now operating? A. Well, in comparing the actual carloads of freight that we handled, we are some weeks handling actually more than we handled in the corresponding period.

The Court: You have to go back to May and April and March of '62?

The Witness: Yes, sir. This—

262 The Court: In order to get pre-strike.

The Witness: Right. For example, I can't give you the last week's figure but, week before last, we handled more in that week than we did in the corresponding week in 1962, 1961 and 1960; so it varies, however, from week to week depending on the normal fluctuation of business. But substantially, we can say that we are handling freightwise all the traffic that's presented to us.

The Court: Everything except the less-than-carload lots?

The Witness: Yes, sir.

The Court: And that is not handled?

The Witness: That's not handled; only carload freight.

By Mr. Edelman:

Q. So that if you had more traffic in terms of—speaking generally about what's foreseeable—you could handle that at the present time, too? A. We can handle some additional traffic, yes, sir. We are soliciting all the traffic that we can handle.

263 Q. At the present time, given your present manpower situation and your present state of equipment and so on, if you were forced to abrogate some of the recent changes you've made in your rates of pay, rules and working conditions, talking about the putting in of the November 2nd, '59 notice and the September 24 "Uniform Working Agreement" which you have in effect, according to the testimony in this Court, how much of a cut would you estimate would occur immediately in the traffic that you are capable of handling?

Mr. Devaney: Your Honor, I object to the form of the question. He has said that if we are forced to abrogate certain rules; I think that we ought to know, for clarity, what specifically he is talking about.

In other words, is he asking this in terms of operations under all or only some of the agreements as they existed before the strike began on January 23, 1963?

I don't follow his question.

Mr. Edelman: I'll rephrase my question, Your Honor.

By Mr. Edelman:

Q. Mr. Thornton, if as a result of the order of this
264 Court or, speaking hypothetically, at the present time you were to operate as to the operating crafts under the original underlying collective bargaining agreements,

apart from the November 2nd, 1959 notice, and if as to the non-operating organizations you were to operate as to the collective bargaining agreements which existed prior to the time that you put in the September 24, 1963 "Uniform Working Agreement", what effect would that have on the—in your estimate, what effect would that have on your present capacity to handle traffic? A. Of course this is strictly a hypothetical answer in regard to your question, but I would estimate that it would probably reduce the traffic that we would be able to handle by approximately 50%.

Q. In the excerpt from your affidavit of March 9, I believe it was, 1964, which you read a few moments ago, a figure of 43% was mentioned. Is there any reason for your higher estimate at the present time? A. Well, actually we've hired some additional people since that time. Our traffic has increased since that time. And I was just gauging this from—for example, we have approximately 400 non-operating employees at the present compared to over a thousand before the strike began. This is
265 roughly 40-60. In other words, it would be a 60% reduction in personnel. And I just, again using a hypothetical answer, rounded it out to approximately 50%.

Q. I see. Would you make a different estimate if the change—let me put this a little more specifically:

If you continue to operate as to the operating crafts or classes as you presently are, that is, under the rates of pay, rules and working conditions that you presently have in effect, but had to make a change in the non-operating conditions affecting the non-operating crafts so that you had to go back to the agreements in effect before you put in the September 24, 1963 agreement, what effect would that have on the present traffic? A. Well, it would ultimately have the same result. Immediately it would affect the safety of the operation. In other words, if you would—it would mean that we could not provide the maintenance of the track; we could not provide the maintenance of the

engines and the cars that is necessary, and it would ultimately result in forcing us to move to reduce our traffic to the amount that we are able to maintain.

Certain revisions are required, for example, in the maintenance of a locomotive, quarterly inspections, monthly inspections, semi-annual and annually. If these
266 maintenance inspections cannot be performed as a result of not having sufficient personnel to make them, then we are not going to have the locomotives to operate the trains. So it will have the ultimate same result.

Q. Well, you say "ultimately". You really mean immediately. I take it you would take steps ultimately to change your manpower situation, would you not? A. Well again, that takes some time to acquire additional personnel and train them, and so your results would be the same. This would force a reduction in the service that we can perform.

Q. Were you present in the Courtroom yesterday when Mr. Shapiro read excerpts of your testimony before a Joint Federal Inquiry Board to Mr. Wyckoff, who was then on the stand? A. I was.

Q. Did you hear Mr. Shapiro make reference to your testimony about the existence of a "long-rang program" for the hiring of manpower at that time? A. Yes.

Q. How long have you had that long-range personnel program? A. Well, our long-range program started the moment we started to operate. In other words, our pur-
267 pose was to try to restore service to the public and we did so, to begin with, with our supervisory personnel. And our plans were to continue to give service to the public in spite of the fact that the unions were trying to deprive us of—by a strike, of doing so; so this was our plan, was trying to restore the service to the public.

Q. Now, did you make changes in certain practices as to the, say, the qualifications of the employees in estab-

lishing that long-range program? A. We set—there was nothing to change precisely. We set standards to have good employees. In other words, we wanted people with good educations, good moral standards, with good backgrounds, with good physical condition. And this is the standards that any company would establish in its employment.

Q. Were some of those standards different from the standards that you had been following previous to the existence of the strike? A. Well, possibly. We tried to get the best employees that we could and, in some instances, it indicated that what we had had before was lacking in many respects and, therefore, we wanted to improve the quality that we had.

Q. Could you give me some examples in which your previous— A. Well, as far as the education was
268 concerned, we wanted to be sure they were in good physical condition—

Q. Could you make this comparison for me, ways in which your previous practices were found lacking? A. Well, we found, for example, that many employees had—or after we had hired them in the past and they had worked for us for a number of years, had back trouble. And, investigating this, we found that these were conditions that possibly could have been determined by back Xrays.

For another example, we found people that we had employed, by not giving a very thorough examination, had possibly had a police record in other States. This, we wanted to eliminate.

So we went into all of this background to try to get the right kind of individual working for us.

Q. And didn't you in fact make your physical examination much more rigorous than it had been previously? A. Well, we tried to get physically qualified people. Now, that was the extent of the examination. We certainly wanted to get physically qualified people.

Q. Wasn't it also part of your long-range program to eliminate featherbedding? A. Well, we certainly want to in any operation on any company or any railroad, we want to have an efficient operation. This is a constant desire of any management.

269 Q. Did you change certain rules and working conditions from what they had previously been in resuming operations once the strike had occurred, with this in mind? A. We didn't change any rules or working conditions immediately. We didn't comply with the agreements that were in effect. We were—we could not comply because the unions walked off the job and we didn't have the people to do the work.

Q. Well, Mr. Wyckoff has told us that.

What I'm asking you though, Mr. Thornton, is whether, in reestablishing positions and formulating this long-range program beginning after the strike started, you didn't have in mind to undertake this reestablishment on the most efficient basis possible? A. Yes, sir, we did.

Q. And whether that non-compliance with the underlying agreements that you spoke of a moment ago wasn't directed at changing them so that—changing the terms for the— A. Well, I don't think you can—

Q. —period of the strike, so that you could operate as efficiently as possible? A. I don't think you can attribute that intent to what—I mean if that's what you say,

270 no; our intent was to operate the railroad efficiently. Now, that's the answer.

Q. Mr. Thornton, didn't you testify before the Joint Federal Inquiry Board on October 1st? I'm looking at page 141 of the transcript, if Mr. Devaney wants to look at this I'll show it to him.

Didn't you say this:

"Prior to the strike, we had approximately 2,000 employees. I do not anticipate that we would need anywhere near this amount mainly because we have been able to

eliminate to a very large degree the featherbedding that has been in the railroad industry."?

A. I did.

Q. So that this was at least one of the effects, an effect, of which you were proud of your long-range program? A. Well, very naturally we were intent upon operating the railroad efficiently, and heretofore there was a great deal of inefficiency in featherbedding, and make work rules in the railroad industry. And as a result of not having the manpower available, as a result of the employees not working, walking off the job, then it was forced upon us.

You know, invention is the mother of—whatever
271 that saying is.

The Court: Necessity is the mother of invention.

The Witness: That's it; necessity is the mother of invention.

The Court: There is also a saying that necessity knows no law, too.

The Witness: I don't recall that one, Your Honor.

By Mr. Edelman:

Q. All right, Mr. Thornton. A. This is what we found ourselves in, being forced to operate with the manpower that was available to us; and we found as a result of this that, much to our own surprise in many instances, the extent of featherbedding that existed.

Q. Now, using your long-range program, at what point would you say you finally achieved what you considered a satisfactory manpower level to carry as much traffic as would be presented to the carrier? A. Well, we are still employing and still training so we haven't—

Q. No, you're not answering my question.

At what point in time did you—I understand that
272 a carrier must constantly be employing new people and training them, but at what point in time did you substantially achieve ability to carry the traffic that would be presented to the carrier? A. Well, we have been

achieving this right along. Of course, your volume of traffic varies. At that time, October, when that was—I was testifying before the Board of Inquiry, this was at a time when the traffic level was considerably different than it is now. The traffic offered to us is substantially different and we have been able to handle—I think I testified—95% then and we are handling approximately 95 or possibly a hundred percent of what we are handling now, but we might be handling a hundred percent more than we handled at that time. So we are talking about two different things.

Q. Let's be careful about this:

How do things vary seasonably in the railroad industry? A. Well, we have the perishable season.

The Court: This railroad, more than most others, is a seasonal railroad?

The Witness: Yes, this is correct.

273 The Court: It is a winter-time, the heavy traffic is in the winter time because of the fruit and vegetables.

Mr. Edelman: Yes.

By Mr. Edelman:

Q. What would that period be, Mr. Thornton? A. Well, principally your perishable season begins in late October and it builds up to the peak along about January, about the time the strike started in this instance, and it holds a pretty good level through until May, and then you hit another high peak in May and then it drops off for the Summer months down to a valley during August, September—July, August and September.

Q. However, you did testify before the Joint Inquiry Board, did you not, and I'm reading from page 155 of that transcript that—this is a question that Mr. Shulman asked: He said,

"What I'm leading to is are you confident of your ability to continue a percentage of 95% as you now start to build up to this heavy traffic?"

And at that time, you said:

274 "Yes, sir, we are and I think there is no question about our handling 100% of the traffic if it was presented."

So you certainly felt yourself capable at that time of doing what in fact you did? A. That's right.

Q. Now, didn't you also testify, Mr. Thornton, although I realize we are talking in the Summertime about a light season, this is page 154 of that transcript, that in August of 1963, I'll read the exact figure you said:

"In August, 90.08% of the traffic and for the first ten days of September, the figures we have available, we were up to 95.53% of the cars handled in the corresponding months of the previous year."

So that you had reached a 90% level by August, hadn't you, during the comparable term? A. That's correct. I might point out, however, in volume of traffic this was substantially less than what we are handling now.

Q. In your hiring over those months, were you able to hire people who had railroad experience? A. Some,
275 but it was in the very minutest minority. It was very few that—the vast majority of it, in fact almost entirely, it was new employees without any previous railroad experience.

Q. Of course you said to the Joint Inquiry Board, and I direct you to page 144 of that transcript. Mr. Shulman asked:

"Do any of these employees you have recruited, have they had previous railroad experience?"

You said:

"Yes, quite a few do. Some have not and we have instituted this training program."

Actually then, I take it, on that, on the basis of that answer, that probably it wasn't quite as hard to train

everybody as you have suggested? A. Well, it depends on what you want to train them for. If you want to train them to be a track laborer, this is not so difficult. If you want to train them to be an accountant or rate man, this is quite different. It just depends on what you're talking about.

The Court: Excuse me. Accountant and rate man?

The Witness: Yes, sir.

276 The Court: They are not union labor, are they?

The Witness: Yes, sir. We have people in—

The Court: In the clerks?

The Witness: In the clerks' organization.

The Court: I see.

The Witness: That do our accounting and also rates and also agencies that quote rate. This is—

By Mr. Edelman:

Q. Didn't you also testify before the Joint Inquiry Board, and I direct you to page 142 of that, you said, in concluding your remarks about your efforts in hiring, you said:

"I think we are approaching the point now where we are almost up to full manpower requirements."

Is that right? A. If that's what it says.

277 Q. Yes, I'm reading it accurately. A. All right.

Q. So you were approaching, as of October 1st, you were approaching the point where you were almost up to your full manpower requirements?

The Court: Excuse me. If there is any question of reading it to him accurately, I suggest you show it to him.

By Mr. Edelman:

Q. Yes, do you want to look at that? A. Well, I just say I assume that's correct. I don't question it.

The Court: Any time you want to see it, why, just ask him.

By Mr. Edelman:

Q. Yes, just ask me and I'll be glad to show it to you. That particular statement is right here. (Indicating) A. Right.

Q. Now, if, beginning in February of 1963 when you started to operate again, if you had been going to institute recruiting in order to operate under the old collective bargaining agreements, you would have had to hire a lot more people, wouldn't you? A. My purpose in operating was to operate the railroad to serve the public.

278 Q. Just answer my question.

If you were going to operate—if you had begun hiring at that time with a view to total compliance with the old collective bargaining agreements, you would have had to hire a lot more people, wouldn't you? A. Well, as we progress along. But our purpose was to operate the railroad.

Q. I understand that. A. Right. And this is what I had reference to in that statement.

Q. As time passed, you would have had to continue hiring more people? A. This is what we have done.

Q. How many people would you presently be employing if you had given the service you are providing, if you had hired over that eighteen months period with a view toward full compliance with the old collective bargaining agreements? A. I don't quite understand.

Q. How many people do you estimate would presently be in your employ if you had been hiring throughout the last seventeen months with a view toward achieving full compliance with the old collective bargaining agreement? A.

279 I don't think it would be substantially different from what we have right now. This is what we have been doing, is hiring people to perform the services. Of course, we are still way short of having the sufficient people to comply with those rules, if we were to have to comply with them; but the fact is we do not have these people.

Q. I don't understand.

You say it wouldn't be much different than it is right now. Why not? A. Because we've been hiring the people as fast as we can hire and train them.

Q. How many employees do you have right now? A. Oh, approximately 850.

Q. How many did you have last October 1st when you testified before the Joint Inquiry Board? A. Offhand, I can't recall exactly. It was referred to in there. Probably I gave that figure.

Q. Yes, you said 650. A. Well, that would be probably correct there.

Q. That's at page 140, in excess of 650 employees. A. And we's hired over 200 employees in the last, whatever that is.

Q. It's about nine months, isn't it? A. Right.

Q. And— But in the nine months previous to that,
280 going back to February, you were able to hire 650?

A. Well, 250 of those were supervisory people that we had at the outset, so—

Q. But still you hired twice as many during that first nine-months period as you have during the last nine-months period? A. That's right, because you get into the problem of training. You can't train—you reach a point where you have to train and get some experience with people you have before you can progress further. In other words, we couldn't have operated the first train without having some—

Q. Well, these people you've got working for you must be substantially trained or they wouldn't be running your railroad for you, would they? A. Well, it's still, if you hire any more, you have got to train those. And it's a progressive procedure. You can't haul in all these people at one time and train them.

Q. You mean, as you get more and more people, it gets harder and harder to train the people, so you've got to hire less and less? A. We have a turn-over, so you have this constant proposition of restoring those that have dropped

off for one reason or another. And in addition to the new people that you are increasing your force with. There has been a certain amount of turn-over. I can't give you
281 the figure but this is happening for one reason or another.

Q. In absolute figures though, you would have to say that your rate of hiring has gone down over the last nine months? I mean, I grant you there must be some turn-over. A. Well, this is right for another reason, too. We have under the agreements that we are operating under, this '59 agreement which went into effect in February, we are complying with the agreement and it will not require that we hire as many people as we did previous to that time.

Q. Of course, that's just February and we are talking about much longer time period, aren't we? A. Well—

Q. We are talking about hiring over. A. Well—

Q. I suppose it's true— A. I don't know how the difference, the 200 we are talking about, when they were hired and in what crafts they were hired, and I couldn't give you that figure, but there are extenuating circumstances in all the situation.

Mr. Edelman: I have no more questions, Mr. Thornton.

282 Further Direct Examination

By Mr. Milledge:

Q. Mr. Thornton, during this past winter, your heavy season, you have been substantially able to meet, to carry all the traffic that has been presented to you? A. Yes, sir.

Q. Isn't that true? That actually started about October and it has kept on; right? A. This is true.

Q. And as you said before, this is a seasonal railroad? A. This is correct.

Q. And what is the normal difference between the Summer and the Winter in carloadings? A. Well, you have a difference as a result of your perishable traffic.

Q. Normally you carry a little more than twice as much

in the Winter as you do in the Summer, do you not? A. I don't know if that would be a real accurate statement. I have never actually said it in that respect.

Q. Well, you prepared a graph, though, that you submitted in the Trainmen case, so that's probably—

Mr. Devaney: May I suggest that if counsel wants
283 to refer to this, he show it to the witness so he will know what he is talking about.

By Mr. Milledge:

Q. All right. (Tendering instrument to the witness) Now, in the year preceding the strike, and I'm referring you to your own graph, you show your Winter peak carloading at what? That's 21,000 cars per week? A. Per month.

Q. 21,000 cars per month. And the low, the Summer low or the Summer average, is about what? A. Well, for the—I say it would average out ten and a half.

Q. All right, thank you.

And when does the Summer—let's see, I'll leave you the graph—it is a matter of fact that you have already started into the Summer period, have you not? A. Not quite yet. Our perishable season runs up into June.

Q. Yes, sir. All right, the graph shows that you start dropping off carloadings really about in April, usually? A. This depends on the season, I imagine. If you have a freeze, it affects your season. This year our peak was within the last three or four weeks and it is going to
284 run into June.

Q. All right. Now, in a normal Summer, you cut way down on your manpower, do you not? A. In certain categories. In your—in some of your operating crafts, it is necessary to; and other of your non-operating crafts, we probably increase the number that we have, depending upon the requirements of the service.

Q. Well, it seems to me that I had the idea that manpower had something to do with the amount of volume of

work you do? A. Well this, for example, with train service, if we run less trains, naturally we would have less operating men but we, as a rule, try to do quite a bit of our own maintenance on track, for example, during the Summer months when we have less traffic or interference with the maintenance procedures.

Q. But in any event, you are coming into the period now which you would normally, your service, your carloadings will be cut approximately in half? A. Well, that indicates that in that period.

Q. Right. A. I don't anticipate it will be quite that much this year because of the Cape situation, our traffic
285 into that area has increased tremendously and it is beginning to—on account of the Space Program, I anticipate that it's going to increase substantially. So I don't think it will necessarily follow that deep a depression during this Summer's months, but we will have certainly a depression compared with our Winter months.

Q. All right. And you are just coming into that period or you will very shortly? A. That's right.

Mr. Milledge: That's all I have.

The Court: Mr. Devaney?

Cross Examination

By Mr. Devaney:

Q. Mr. Thornton, are you still using supervisors to perform scope work? A. Yes, sir.

Q. Do you have any idea of how many of your supervisors are still required to perform scope work? A. Well, it's difficult to say. It depends on any particular day. If we run into a situation where we have to have them, then we can certainly call on them to do it, to give the
286 service. On another day, we might not require as many. But on occasions, I suppose we use a considerable percentage of them. Again, it just depends on the circumstances.

Q. Now, when the strike began on January 23rd, 1963, did you have any scope employees left to perform service? A. No, we had—all of the scope people went out on strike or respected the picket lines of those who were on strike.

Q. If you had been able to operate only under the terms of the various agreements that had been in effect before the strike occurred and follow them to the letter, could you ever have performed service? A. No, sir, we could not have operated the first train.

Q. And why not? A. Well, we had no employees with which to comply with the agreement. It's against the agreement for a scope employee—I mean, for a supervisory employee to perform the service. Likewise, we could never have trained new employees to have performed the work because you've got to operate the trains and put the employees out there and give them some on-the-job training in order to qualify them for the work. Or if you even hired an experienced man, he couldn't go out and perform the work unless you had him out on the road and let
287 him ride the train and learn the road. So we would never have been able to operate the first train if we had to comply with the agreements that were in effect.

Q. Now, the fact that you operated in this manner, do you contend that this changed those contracts? A. No, it didn't change them. Merely, we were not able to comply with them because we did not have the personnel. The organizations went on strike, effectively to deprive us of a work force. And our only alternative was if we were going to serve the public, which we have a legal obligation to do, was to operate the railroad with the men that we had available.

Q. Now, to give us some idea of the specific problem, Mr. Thornton, how many operating employees did you have available when you resumed service on February 3rd? A. Well, on February 3rd, approximately 8 to 10— about a dozen, we'll say.

Q. These were all supervisors? A. That's right.

Q. And what service did you begin, or what did you first do on February 3rd? A. Well, we operated one southbound train on the 3rd, and then on the 4th we brought back that crew and operated another southbound
288 train. So it was just one train in each direction.

Q. And how many people, operating people, were required to operate one train in each direction? A. We used four men on each one of these crews.

Q. And this—what positions would they have filled? A. Well, substantially they were the engineer, a conductor, and two trainmen.

Q. And you used the next—you used four more on the train in the other direction? A. Yes, sir, in the same capacities.

Q. Now, what would the agreements in effect before the strike have required by way of manpower to make the same trip from Jacksonville to Miami? A. Well, the work that this four-man crew performed, actually they had to pull the cars from the connections, which would involve a yard crew. They had to make their own train, which would have involved probably another yard crew. They had to put the engine on the train, which would have involved another crew. They would have had to operate the train from Jacksonville to Miami, which would have required three separate crews of five men each. And when they got into Miami, they broke up the train and placed the cars, put the engine away, which would have required probably two or three more crews at that location.
289 In addition, I can't recall exactly but I imagine they conducted their own brake test, inspecting the cars. This would have required mechanical men, car inspectors, to perform the service.

I'm sure they also performed the checking of the train, insofar as the cars, writing up the waybills. This was—so actually, those four men probably did the work of conceivably fifty or more men but, in doing so, we probably violated—I don't use the word "violated"—we probably

didn't comply with a very large percentage of the rules that were in effect prior to the strike. We could not have complied with these rules and have operated that first train or any train.

Q. Now, it has been suggested that, in questions directed to you, that you have operated and are now operating the railroad and carrying approximately the same amount of freight that you carried before the strike began, and that you are doing it with fewer employees.

Now, has this resulted in a net savings to the company? A. Well, we have been able to increase our efficiency considerably and this, of course—able to—permit us for operating income to improve our situation. However, when you get down to the net, there hasn't been the im-
290 provement that we would like because of the sabotage and vandalism and the wrecking of the trains that has been going on. This, of course, has offset to a very large degree any efficiencies that we have been able to accomplish.

Q. What magnitude has the sabotage amounted to?

Mr. Milledge: Excuse me. I don't think this is at all relevant here.

Your Honor, we were talking about profit a little while ago and the Government wasn't permitted to go into profit. And Mr. Devaney is now back on the profit question, which I don't think—it has been ruled as irrelevant for the Government. I think it is irrelevant for the railroad also.

Mr. Devaney: Your Honor, I'm not interested in the question of profit but I am merely—

Mr. Milledge: You are interested in the question of sabotage.

Mr. Devaney: Mr. Milledge, I am interested in the question of the Government saying that we have set about to change all these rules because of its financial advan-
291 tage. Now, if you think that we have operated for this reason—

Mr. Milledge: Are you speaking to me or to the Court?

Mr. Devaney: —and we have entertained this, you are mistaken and we have a right to show it. This is what it is for. We are not interested—we have not objected to going into the profit question, if it were material, but we do feel that we have a right to show—the Government has contended that we have derived great benefit. Now, we have not derived a great benefit and we have not in part because of the sabotage. I think we have a right to show what impact it has had on the railroad.

Mr. Milledge: Your Honor, we renew our objection.

The Court: I think it's irrelevant, to my mind. There isn't a remote connection with the issues here.

By Mr. Devaney:

Q. Now, Mr. Thornton, you were asked, or the statement was made by the Court, that you weren't carrying LCL. This is less-than-carload freight? A. This is correct.

292 Q. Was this handled to any substantial degree prior to the strike? A. No, this was—we handled very little of it. The majority of the LCL in recent years has gone to these car-loading companies. Now, we handle it in carload lots for these people but, as to specifically handling it ourselves, this has been on a very steady decline in the last ten years. And now, or immediately prior to the strike, we handled a very small amount of LCL freight.

The Court: If the truckers don't get it, why, its loaded in this piggyback service in carload lots and—

The Witness: Yes, sir. Or some freight forwarding companies.

The Court: Yes, sir.

Mr. Devaney: I have no further questions, Your Honor.

The Court: Anything further, Gentlemen?

Redirect Examination

By Mr. Edelman:

Q. Just one or two questions, Mr. Thornton.

I gathered from your earlier testimony that
293 given—that this is really now one of the peak seasons for the railroad and that you are handling all the business that's coming your way, that you have really sort of probably levelled off in your manpower requirements, apart from turn-over problems.

Is that about what you said? A. Well, we still are employing some; but operating under the agreements that are presently in effect, we do not require a great deal many more but we will continue to hire and employ until we have met all of our requirements.

Q. You told—yet you told Mr. Devaney that you are still using supervisors for scope work? A. Well, I—that's correct.

Q. Is that part of your long-range program? A. As I indicated to you in my answer that we are still hiring people because we haven't got enough, and this is the reason.

Q. Yes, Mr. Thornton, you testified before the Joint Federal Inquiry Board in the following manner. You said:

"At the outset of this work stoppage, we utilized"—

This is at page 139—

"we utilized primarily our supervisory personnel. As it
became obvious to us this work stoppage was going
294 to be of prolonged duration, we made the necessary arrangements and plans and have executed these plans for the recruiting of personnel to continue the operation and restore it to full service in all respects."

Then you went on, and I read you the statement before. You said:

"I think we are approaching the point now where we're almost up to full manpower requirements."

This was nine months ago. My last statement is not a quote, of course. Is that right? So that then you were approaching full manpower requirements, and now you are still using supervisory personnel; am I right? A. We are using supervisory personnel because we don't have sufficient people to do it, and also, I don't mean to imply that when the labor organizations went on strike and deprived us of the work force that it was incumbent upon us to comply with all the respects—

Q. No. You are not answering my question, Mr. Thornton.

I'm saying that you told the Joint Federal Inquiry Board in October that you were approaching your full
295 manpower requirements, having at one time having to utilize almost all supervisory personnel and having tried to eliminate that situation by recruiting; and yet nine months later, you are still using supervisory personnel; is that or is that not true? A. That's correct.

Mr. Edelman: Thank you.

Mr. Shapiro: Your Honor, this concludes the Government's case in chief on this Motion for Preliminary Injunction.

(Witness excused)

The Court: Now, we have the question of the duces tecum subpoenas. We have this Rule 34 Motion served this morning.

We have a Rule 37 Motion with respect to Mr. Eugene Thompson's deposition.

I'll take those up any way you want to.

Mr. Devaney: Very well.

I believe the first one logically, Your Honor, would be this Motion to Compel the answer of Eugene C. Thompson.

We set forth in the motion that Mr. Thompson
296 was instructed not to answer a series—

The Court: I'm curious about one thing. How is this going to help us in this application here? Do you

suggest you go back and get further answers and then consider them?

Mr. Devaney: Well, it helps this way, Your Honor: It is part of—we have not yet put on any witnesses to put on our own case, but it goes to the question of the entitlement to the preliminary injunction. It goes in part as to whether or not there has been any failure or refusal on the part of the defendant to refuse to bargain itself.

The primary contention of the Government in its application and in its motion in support of the Motion for Preliminary Injunction is, as I read it, that the Florida East Coast has refused to bargain because, by way of example, it insisted on the presence of a Court Reporter.

Now, in part, these questions which were asked of Mr. Thompson—

The Court: Well, isn't the main thrust of the
297 Government's here not at whatever reason caused the breakdown of bargaining but the fact that, the claim that this carrier has resorted to self-help without exhausting the Railway Labor Act procedures?

Mr. Devaney: Well, this is their contention.

The Court: Regardless of what caused it to break down.

Mr. Devaney: This is certainly their contention, Your Honor, but the difference as to how this comes about, I believe that the first contention that the Government makes is that the operation of the railroad from February the 3rd forward, that we could not operate except in strict compliance with the agreements that were in existence before the strike took place.

Now, it is true that they are contending that this was improper on the part of the railroad. Now, this was one of the issues, as I said yesterday, that was involved in the BRT case and it is one of the main issues that is now before the Court of Appeals in 21356. But it is
298 reiterated here that as soon as we resume service, we could only resume service by complying to the

letter with the agreements that were in force before the strike began.

Now, they then say that the change in agreements pursuant to the two Section 6 notices, the one relating to the union shop and the second relating to the September 24 notice to change the agreements and place into effect this uniform agreement, that we did this improperly.

Now again, we have said that we were justified in doing this because the unions refused to bargain. It was the unions, not the railroad, that refused to comply with the provisions of the Railway Labor Act.

Now again, those issues were involved in 64-40, but—

The Court: Well, if the bargaining broke down because it broke up in a fist-fight or because everybody got drunk and nobody knew what was going on or one side or the other objected to the Court Reporter or whatever the reason, the bargaining broke down. Either side had
299 the right to invoke the services of the National Mediation Board, didn't they? That's the thrust of this complaint.

Mr. Devaney: This is the thrust of their complaint.

The Court: Oh, he says—I looked back at his complaint while you were talking. Numbered Paragraph 6 of the complaint says:

"On October 18, 1963, representatives of the Carrier met with representatives of the 17 Labor Organizations to discuss FEC's proposed changes of September 24. The conference was terminated after representatives of the Labor Organizations objected to the presence of a Court Reporter."

That isn't any attempt, to my mind, to assess blame or to give a reason, to say who was at fault, for the negotiations breaking down. It is a statement of fact that they did break down and it's undisputed that they broke down and that they broke down for this reason; isn't that right?

Mr. Devaney: Well, I think that is correct, Your
300 Honor, but the question that they have raised is, of course, carried out in their memorandum in support of the Motion for Preliminary Injunction. Now, there they actually argue the question that we had no right to insist upon the presence of the Reporter and that, when we did so, we were refusing to bargain.

The Court: Yes, sir.

Mr. Devaney: Now, it is because this issue has been raised, as if Florida East Coast in each of these instances has refused to comply with the Act by refusing to bargain, that we have raised as a defense to that the question that we were entitled to have a Reporter present.

Now, I concede, Your Honor, that the other issue is also present, namely: Whether, assuming that this were true, a party may still make this change even if the unions came in, as we believed the unions did here, and say flatly without any reason that "We refuse to bargain". Now, I concede that the question, the legal question, is still present: Can a carrier, where the unions refuse
301 absolutely to enter into bargaining, refuse to take the first step required by the Railway Labor Act, is there any right to go ahead and make the changes?

Now, we feel, of course, this is present here and no matter what happens on this Reporter issue, I concede that that is still present and it is one of the arguments—

The Court: I'm looking at your answer. I think probably this thing is raised. It is in the case; I think it is in the case. I think you are right about that; it is in the case.

Mr. Devaney: Now, the other issue which is raised, Your Honor, is whether or not the Government itself can refuse to assign a Mediator, as the Mediation Board has. I mean, it has taken jurisdiction. It has said, "We are going to assign a Mediator." It has sat on the cases. It has not assigned a Mediator. As to whether or not they are in compliance with their own obligations under the

Act, and if they are not, whether or not this does not bar the Government from coming in and asking for
302 this injunctive relief.

And further, it goes to the question as to whether or not, even if injunctive relief were to be granted, whether the carrier is entitled to, even if it were to be granted, to this being conditioned on the Mediation Board fulfilling its obligation.

Now, what the deposition of Mr. Thompson was directed to in part was the attempt to develop what actually occurred with respect to the Reporter issue and to the issue of the assignment of Mediators to this case. And on everything that we asked, the door was closed, on the assertion that this was privileged. And that's why we believe that this in part is relevant to this matter of the preliminary injunction because it goes to whether or not the Mediation Board has acted as if it were required to act under the Railway Labor Act, whether or not it has failed to assign a Mediator and whether in fact the Mediators themselves have failed in their obligation to attempt to mediate the dispute.

Now, these are not all covered by the Motion to Compel the answer of Mr. Thompson but they are
303 all—the first two certainly are—involved, namely, the Reporter issue and the operation of the Mediation Board in the assignment of Mediators to this case.

Now, I think the questions illustrate this quite pointedly and I think the question or the assertion of the privilege indicates that it's without foundation. And if I may, let me read just a couple of them.

The first one:

"Q. And do Mediators customarily make notes, during the course of their meetings with the parties, from which they prepare this report?

"A. Some do and some don't.

"Q. With those who do have you found that this interferes in any way with the course of negotiations?

"Mr. Shapiro: Objection. This deals with the procedures and techniques by which the Board conducts its mediations and, as to these matters, the practice is privileged, and I instruct the witness not to answer."

304 The next one was:

"Q. Now, do you recall, Mr. Thompson, that in this report that Mr. Newlin indicated that the company had requested that he proceed with his mediatory efforts, and that he had declined to do so?"

The Court: What page is that?

Mr. Devaney: This particular one, Your Honor, is at page 9.

The Court: I've got it now.

Mr. Devaney:

"Mr. Shapiro: Objection. This consists of the Mediators' reports to the Board and are confidential. They relate to the manner in which the Mediation Board conducts its mediation functions. They are privileged and I instruct the witnes not to answer."

The next one:

305 "Q. Did Mr. Newlin report in this reports, Mr. Thompson, any conversations between himself and officials of the Florida East Coast Railway Company?

"Mr. Shapiro: I object to the question on the ground that the contents of the Mediator's report are privileged, and I instruct the witness not to answer."

The next question:

"Q. Mr. Thompson, in the course of your experience with the Mediation Board, first as a Mediator and then as Executive Secretary, isn't it true that Reporters have sat in on Mediations on various occasions?

"Mr. Shapiro: I object on the ground that this deals with the practices and procedures of the Board in con-

ducting mediations and I instruct the witness not to answer."

Now, we could go through each of them, Your Honor, but I believe that each one of them clearly indicates
306 that there is nothing privileged in the material which is sought. We asked for material that related to what had occurred with regard to the Florida East Coast. It did not—we did not ask for information concerning any statements of position by the other parties. We asked for, as much as we could, for factual information within the possession of the Mediation Board, and he declined to answer.

Now, when we reached the question of the assignment of Mediators, on page 4, number 7, the question was:

"Q. Now, was there any reason, Mr. Thompson, why these particular cases, including five cases docketed by your Board on or after January 1st of 1964, were assigned to a Mediator whereas cases going back earlier in 1963, and the one in 1962, have not been assigned to a Mediator?

"Mr. Shapiro: I object to the question on the ground that this deals with the reasons why the Board assigns or does not assign Mediators. It relates to its delibera-
307 tions and is, therefore, privileged."

I asked in Number 9:

"Q. What action is contemplated or is normal for the Board to take when it is considering these cases?

"Mr. Shapiro: Objection. That goes to the Board's deliberative processes. It goes to the practice of the Board in conducting mediation.

"I instruct the witness not to answer."

And so we go all the way through, Your Honor, that the door was closed and yet they are contending that we have not complied with the requirements of the Railway Labor Act. Yet the Mediation Board itself has not assigned a

Mediator, has not undertaken, as it is required to do, the mediatory function imposed by the Act.

Now, unless and until they have complied with their obligations, it is our position in this case, Your Honor, that they cannot come here and obtain injunctive relief on the theory that we haven't bargained, when the Mediation Board has not permitted the bargaining under its auspices to go forward.

308 Now, we believe that there is nothing in these questions which was privileged. I think that the decisions clearly indicate that where the United States is a party, as it is here, that the United States is treated as any other party is treated.

Now, this means that as to matters which are privileged, there are instances in which a privilege has been recognized for special reasons. Certain informers are protected. This is not a case of informers. We have not asked here for any confidential material which was furnished to the Board by one of the parties, which the Board received in the course of any investigation. We have asked what the Board did with respect to the cases docketed involving Florida East Coast and whether it had or had not done certain things and why it had not done certain things, and we aksed that those questions be answered and they were denied.

Now, related closely to this is our Motion for the Production of Documents. Now, one and two, we do not desire to put the Government to any undue burden. If this poses a problem for them at the moment, I'm sure that

309 the documents which they do have in their possession and have with them would at least be the first step. But items three and four deal with the minutes of the executive meetings of the National Mediation Board, which were referred to by Mr. Thompson and which he said were held—at one point in his deposition he said that there was an executive meeting on March 25, and he later said no, they never did have it because Mr. Newlin's report

hadn't been received. And he later said well, they had read it but he still hadn't done anything; so I don't know what they had, but he said they keep minutes of these executive meetings and we simply are asking that we be given those minutes as they relate to the Florida East Coast.

Now, we are not asking for any position of the unions. If that is involved in any of them, this is not the purpose of this motion at all.

And, in number four, we are again interested in the reports of the Mediators and, again, we are not seeking to gain the position of the unions in this dispute at all.

And we believe that all of this is material that we
310 have every right to; and having examined the various decisions, I do not find that there is any justification for the claim of privilege here.

Now, I might say that the Fifth Circuit Court of Appeals in '61 has had occasion to examine into a claim of privilege which was raised under 5 U.S. Code, Section 22. Now, they said that this was a housekeeping regulation, that Congress did not intend to give the head of any executive department the right to determine what is privileged and what is not, that that is the proper function of the Courts to determine.

Now, the decisions of the various Courts in looking at the question of privilege have never granted a privilege to a communication of this sort where the United States is the plaintiff and where it is one of the specific issues raised in the litigation.

The Court: That is the submission both on the Motion for Production under Rule 34 and the Rule 37 Motion?

Mr. Devaney: Yes, sir, 37(a); both 34 for the Production and 37(a) for the Motion to Compel Answers.

311 The Court: Thank you.

Mr. Shapiro: I would like to address myself, first, to the Motion to Compel Answers. I am a little concerned because it's asking that Mr. Thompson be directed to answer certain questions. Mr. Thompson is not here in this

District and Rule 37(a), which is the Rule under which this motion is filed, says that if a party or other deponent refuses to answer any question propounded upon oral examination, the exationation shall be completed on other matters or adjourned as proponent of the question may prefer; and thereafter, on reasonable notice to all persons affected thereby, he may apply to the Court in the District where the deposition is taken for an order compelling an answer.

I think that the—

The Court: That, of course, is he may, the deponent may ask for protection or his counsel may ask for protection to go to the nearest District Judge and get it. That's permissive. I don't think that the effect of that is to take control away from the Court where the pro-
312 ceeding is pending.

Mr. Shapiro: Since the deponent—

The Court: That's why I said yesterday—that's what I said yesterday, it's unfortunate that, at the time the deposition was going on, some appeal was not made to one of the District Judges in the District Court of the District of Columbia and some decision reached about these matters, so we would either have his answers or have a ruling in there that he did not have to answer, but nothing was done at the time apparently by the parties. The deposition was closed up and—

Mr. Shapiro: That's right.

The Court: —and sent on in here to this Court.

Mr. Shapiro: Yes, sir. Since the deponent isn't here, I don't know how he can be directed to answer. And I would think that the proper form in which this should come up is the Court in the District of Columbia, which issued the subpoena under which Mr. Thompson
313 was deposed.

Now, passing from that and assuming that the Court will pass on the motion here at this time—

The Court: Rule 30(b) is involved, too, I think. That doesn't go to the questions actually.

Mr. Shapiro: I think 30(b), Your Honor, is for the protection of the deponent. And 37(a) is for the protection of the party who poses the questions, and it does say expressly that the Court in which the—the Court in the District where the deposition is taken is the Court to which one applies for an order compelling an answer. Of course, the witness is then present and can be directed by the Court to answer.

The Court: 30(d) may come in; I don't know. There were certain things that could have been done at the time the deposition was going on anyway that were not.

Mr. Shapiro: I think 30(d) I would have invoked if I had believed that Mr. Thompson was being harassed
314 and the like, but I didn't feel I had a basis for that.

The Court: Bad faith, and so forth.

Then there would be an application to the Court in the District where it was being taken.

Mr. Shapiro: Yes, Your Honor.

The Court: To control the scope and the manner of the taking of the deposition.

Mr. Shapiro: Yes, sir. This, again, would relate to protection of the deponent and not compulsion of the deponent to answer.

It's my belief that under the Rule, he should be, if he refuses to answer and the questioner wants him to do so, he should bring him into the Courtroom and ask that he be directed to answer.

The Court: I don't believe I have the power to impose a sanction on the Government by way of paying costs and paying attorneys' fees, and so forth, that 37(a) carries either—the specific statute covering it.

315 Mr. Shapiro: I think, Your Honor, that the sanction that you would impose if it were necessary that it be done would be only if there was a refusal to answer

or a refusal to comply with an order of the Court directing that the witness do so—Mr. Thompson do so.

The Court: The thing that bothers me, I don't have Mr. Thompson here. That doesn't reach his place of residence.

Mr. Shapiro: That's why—

The Court: And Mr. Thompson, it would be very difficult for me to enforce any requirement on Mr. Thompson. I might be able to direct that counsel for the Government produce Mr. Thompson at a further hearing in the City of Washington and—

Mr. Shapiro: If this motion—

The Court: —and say that the relief that you seek is going to be withheld until you do produce him and
316 withdraw your objection to his answering the questions, or do something of that sort. I don't know any way I can get him down here, or any punishment or sanction I can—anything I can do to him.

Mr. Devaney: Your Honor, may I interrupt just a minute? I don't mean to be injecting myself before Mr. Shapiro has completed his statement but I believe Your Honor's analysis is quite correct.

Number 1, the cases have held that the penalty of costs against the Government will not be allowed, but they have also quite clearly held that the way, if there is a refusal, it's true that the deponent is not here before this Court, but if there were a refusal to answer, then this Court could withhold the relief, it could dismiss the complaint. There are a number of decisions that so indicate. It's this Court that really has the ultimate control over what happens. It's not over—it's not a personal—with Mr. Thompson, this is not a personal refusal. This is a question of privilege which was asserted—

The Court: He was directed not to answer.
317 Mr. Shapiro: Yes, Your Honor, that is true.

Mr. Devaney: That is correct.

The Court: That part is very clear.

Mr. Shapiro: Well, Your Honor, again, glancing at the full text of Rule 37, my impression is that since the Rule provides that the deponent who is directed to refuse to answer will be brought before the Court in the District where the deposition is being taken, the sanction is expressly stated in the Rule. If the motion is granted that the witness answer the question, then there are certain sanctions that follow if the refusal was without substantial justification.

If the motion is denied and if the Court finds that the motion to compel the witness to answer was without substantial justification, there are certain sanctions that could be imposed on the person who dragged the deponent down to Court. Those are the only relevant sanctions under Rule 37(a).

Now, the Government here is—

318 The Court: Well, I think, as I suggested and Mr. Devaney seemed to agree, I think I can make some law of my own to take care of the situation. I can provide—I think I'm free to provide an appropriate device that would operate directly on the parties before the Court and let them worry about getting hold of Mr. Thompson and handling him.

Mr. Shapiro: I would think this might be covered—it wouldn't be a matter that Your Honor would have to devise on. I think it's covered by Rule 37(b)(2), dealing with failure to comply with order.

The Court: Well—

Mr. Shapiro: And there again, the provision appears to be execlusive:

"If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a)—"

The Court: Requiring him to answer—well, it doesn't, maybe it doesn't quite hit it but there isn't any real

319 question about being able to work something out.

Mr. Shapiro: Well, in turning—

The Court: I could just simply say right now that this—for instance, that this hearing could adjourn until after this deposition had been completed and Mr. Thompson has answered the questions. That seems to me to be about as effective as anything else I could do.

Mr. Shapiro: Well then, I think—

The Court: Let's get to the merits of it.

Mr. Shapiro: Let's turn to the merits of the motion.

The Court: To the source of the claimed privilege.

Mr. Shapiro: All right.

The first question is one of relevance of these questions. What are the issues in the law suit?

Well, Mr. Devaney has characterized them in terms
320 somewhat different than I understand the complaint and our Motion for Preliminary Injunction.

First, we are complaining that the carrier has put into effect certain rules, rates of pay and working conditions without going through the formal procedures of the Railway Labor Act.

Now, we claim that because they didn't go through those procedures, they are violating their duty to bargain in good faith.

It is not our claim that their insistence on the Court Reporter is itself the violation of the Railway Labor Act.

It is, as Your Honor stated earlier, simply the occasion which led to the break up of the bargaining conference.

Now, as to that issue, how Mediation conduct mediation and how the Mediation Board conducts mediation is not relevant.

The only thing that is relevant really is the fact that the conference broke up, for whatever reason it broke up; that the carrier put its rates of pay, rules and working conditions into effect at a time when the services of the Mediation Board had been seasonably invoked.

321 Now, these questions about how the Board conducts its mediation function do not relate to that issue.

On the second issue, which I understand the claim is made to which these questions are said to be relevant, goes to the defense that the refusal to bargain, as it is put, of the unions justified the carrier's putting these rates of pay, rules and working conditions into effect.

Now, if they do, that seems to me to be a purely legal issue and, again, how the Mediation Board conducts mediation is not relevant to that defense of compliance with the Act.

We have a position on the merits on that which is in essence that a refusal of one side or the other side to bargain, which is followed by invocation of the Mediation Board's services, does not excuse either side from its obligations under the Act and that they cannot resort to self-help if the services of the Board are invoked.

Now, that's our contention, but the issue that's involved in that aspect of the case is simply a legal issue. There's certainly no necessity for probing the functions of
322 the Mediation Board on that issue.

Now, the third matter which has been raised, and again, this is a matter of defense, is that since these cases were docketed by the Mediation Board, it has not mediated.

I think again that this, as we shall try to show, is irrelevant. The fact that the Board has not mediated is established. How and why the Board mediates, hasn't acted, is not the crucial issue. The question of whether this is a defense at all comes up. I think we might as well face it briefly.

First, I would like to emphasize that this suit is not by the Mediation Board but by the United States. Part of the ground on which the United States claims standing here is that it's seeking to protect the function of the Mediation Board.

Now, the carrier in this case informed the Mediation Board at the very moment that its services were being invoked that the labor organizations did not have the right to invoke the services of the Board and, therefore, it was

putting its rates of pay, rules and working conditions into effect.

323 It's the Government's position that when it did that—put these rates of pay, rules and working conditions into effect—it violated the Act by doing that at the outset.

Now, the Mediation Board advised the parties of the Section 6, but since the carrier's position was that the Mediation Board had not jurisdiction and since the Government's position is that the carrier is in violation, we have the unique argument being made that the Mediation Board's failure to mediate after the carrier violated the Act bars the United States from taking steps to remedy that.

Now, the whole purpose of the Railway Labor Act's status quo provisions are to establish a climate in which mediation can take place, to establish that there be an atmosphere of stability for the Board to carry on its functions and for the parties to carry on their negotiations under the auspices of the Board in.

That atmosphere was destroyed, in the Government's view, the minute the carrier put its rates of pay, rules and working conditions into effect, at the very beginning of the invocation of the Board's jurisdiction. There-

324 after, the Mediation Board did not mediate. How can it be relevant to the issues in this law suit to say that, after the carriers violates the Act, somehow the Government is foreclosed from doing something to restore the status quo the Act requires? Because it doesn't carry on with mediation which the carrier refuses to recognize and which the carrier treats as being in violation of the Act?

I don't see how these questions about why the Mediation Board hasn't acted go to that issue. The fact of the matter is that the Mediation Board hasn't acted. The fact of the matter is that the carrier is, at this late date, some six months after the invocation of the Board's services by

the unions, suddenly demanding that there now be mediation, and it is demanding this while it has had these rates of pay, rules and working conditions in effect. It is saying in short that the Mediation Board's failure—that the Mediation Board failed to cure our violation of the Act by coming down and mediating and then discharging us from responsibility to maintain the status quo by proffering arbitration and getting out of the case. All the time, however, they have had—they had changed the
325 status quo.

Now, these questions just don't go to that legal issue. The legal issue is plain, whether this is a defense or not.

Now, finally, if the questions are considered relevant—I have one or two additional remarks. Perhaps, before I turn to those additional remarks, there's one other thing I should say about this claim that the Board's failure to mediate cures the violation of the Act.

I think the carrier here is really advancing the contention that it might advance if it had been in compliance with the Act.

Let's take the case where they did not change the status quo, they did not put these rates of pay, rules and working conditions into effect. They did not abrogate the union shop agreements, and the Mediation Board's services were invoked, and then the Mediation Board doesn't mediate.

Now then, they've got a pretty plain remedy, it seems to me. After a reasonable time if the Board hasn't acted and hasn't responded to a demand that it act, they could go into Court seeking an order directing the Board
326 to either start mediation or to discharge them from the obligation to maintain the status quo so that they can resort to self-help. But that's not the situation in this case at all.

This is a case in which the carrier put the changes into effect as soon as the Mediation Board's services were in-

voked and the carrier refused to recognize the Board's jurisdiction. And it's just not in position to complain of the failure to mediate when it has itself failed to maintain the status quo under the statutes.

Now, the Government is bringing this suit and claims standing to vindicate the purposes, the processes, of the Railway Labor Act.

If the injunction is granted, the Court may very well condition it on some requirement that the Mediation Board promptly undertake mediation. I think that's within your equitable discretion and I dare say the Board would be more than willing to try, once the statutory condition, the statutory atmosphere, is restored. But these questions don't go to that issue; they go to questions about how the Board conducts the mediation function, and this gets us directly down to the issue of: Are these questions
327 privileged?

I have to say a word about the Mediation function, first of all. Mediation is not in any way similar—

The Court: Excuse me. Before you start; there's nothing in Section 5 of the Railway Labor Act indicating that it is privileged, is there?

Mr. Shapiro: No, there's no statute which expressly states that the Mediation Board's activities are privileged. There is, however—

The Court: That's another reason really that I would prefer this application had been made to one of the Judges in the District of Columbia. They are right there where all these Government departments are and everyone of them holler "privilege" whenever they get in Court, and those Judges up there are accustomed to it and have it more often than I do. I've had it in a good many other Government departments. It has usually been difficult for me to see where a privilege existed that they claimed.

328 Mr. Shapiro: Well, I would state, first, Your Honor, that at least as far as this Department of

Justice lawyer is concerned, the invocation of privilege on behalf of a Government Agency in a legal proceeding, when we base this on a claim that it's privileged because of some peculiar Governmental aspect of the claim—

The Court: I want you to—

Mr. Shapiro: —it's extremely serious.

The Court: I want to have your position in mind. I don't want to discourage you by making that observation, but I do say that one of the Judges in the District of Columbia might be more familiar with handling this type of claimed privilege, because they are dealing with the Government departments more than we are.

Mr. Shapiro: Well, I was going to say that the invocation of the privilege is not done lightly, at least not by the Department of Justice. We consider it very, very
329 serious because the Government as a whole, at least in the Department view, should operate to the extent it's possible in a glass bowl. Now, to decline in a legal proceeding to make matters public, to make matters available to the parties, is very serious and we recognize this and we haven't raised this privilege lightly. There are very strong and compelling reasons why the Mediation Board's processes must be protected.

I was groping about, Your Honor, for a copy of the National Mediation Board's Rules of Practice. I had it in my hand until a moment ago.

The Court: Why don't we stop a few minutes and then proceed in about ten minutes.

(Short recess)

Mr. Shapiro: I just thought I would sum up the positions—

The Court: Well, I thought at this time you would go into the privilege question.

Mr. Shapiro: All right, Your Honor.

The National Mediation Board has Rules of Pro-
330 cedure which are published in Title 29 of the Code of Federal Regulations, from Part 1201 to Part 1206.

Rule 1202.15, entitled "Non-disclosure of Information", recites the considerations upon which the Board bases its claim for confidentiality of some Mediation Board records and public availability of others.

The Rule states, in the first paragraph:

"Public Policy. A successful effectuation of the National Mediation Board's mission under Section 5, First of the Railway Labor Act, as amended, requires that members, officers and employees of the Board maintain a reputation for impartiality and integrity. Labor and management or other interested parties participating in mediation proceedings must have the assurance and the confidence that information disclosed to members, officers and employees of the Board during the mediation process will not be divulged needlessly."

The Rule continues:

331 "The formal documents such as the invocation or proffer of mediation and the reply or replies of the parties, the proffer of arbitration and the replies thereto, and the notice of failure in mediatory efforts in cases under Section 5, First of the Railway Labor Act as amended are matters of official record and are available for inspection and examination by persons properly and directly concerned at the offices of the Board in Washington, D. C."

Now, the Rule continues that:

"All reports, information or documents other than those specified in Paragraph (b) of this Section obtained or prepared during the mediation process by the National Mediation Board, its members, officers or employees for Board use in the course of official activity under Section 5, First of the Railway Labor Act as amended are hereby declared to be confidential. Officers and employees are here-

332 by prohibited from making such confidential report, information or document available to anyone other than a member, officer or employee of the Board unless the Board authorizes the disclosure of such information or the production of such document."

Now, this question of the Mediation Board's deliberations and procedures for conducting mediation came up in this case before Judge Curran of the District Court for the District of Columbia a week ago last Monday. The carrier subpoenaed the Executive Secretary of the Board, Mr. Thompson, and the three members of the Board as well.

The Court: You mean for this?

Mr. Shapiro: For this proceeding, yes.

The Court: For this proceeding?

Mr. Shapiro: Yes.

333 The Court: Well, this thing has been—

Mr. Shapiro: This thing, is part, has been.

Now, the Government moved before Judge Curran to quash the subpoenas on the members of the Board and we based that upon our contentions that there were no factual issues germane to this law suit as to which their testimony on their deliberations, their mediatory processes, the Board's mechanics for conducting mediation were relevant.

We also contended that, insofar as the questions seek to know why the Board has acted or not acted, it's an attempt to explore the deliberations of the Board, which we consider to be privileged.

And finally, because the mediation process itself by its very nature is one which requires that a lawyer-client-like confidentiality be maintained.

Now, there's a further aspect to that, Your Honor. Mediation is a subtle and difficult art. It's not something that's a rational procedure in which you take positions and compare them and try to maintain a consistent

334 approach. Each mediation problem is different. Each situation involves strong-willed men, on opposite sides, firmly convinced of the rightness of their positions, who have to be manipulated and maneuvered and cosseted and persuaded. They have to be taken off into a corner and talked to. There may be attempts to cut one of them out of the mediation because he's being too obstreperous. There may be an attempt to induce somebody

else to come in. The techniques vary fantastically and they require that the Board decide how it's going to handle these cases, in complete and utter confidence even among itself, so that there are times when the parties to the mediation will not know what's in the members' minds, what the National Mediation Board has instructed their Mediators to do, that the Mediation Board is interested in trying by some technique or other to get people to agree.

Now, that whole process rests on a complete confidentiality. If you open up the Board to the processes of the Court so that someone can explore their techniques, so that it becomes a public matter as to how they work and what they do, then the effectiveness of the Mediation
335 Board is gone. Mediation is so sensitive and such a remarkable, unusual process that it can't be made a public matter.

Now, that's why we consider this matter of privilege to be so important and why we raised it here.

Now, there's no reason why we should have to reach this difficult privilege question, if there are no issues which are germane to this litigation and more particularly to this application at this time. And we think there are none. We think that there is in 5 U.S.C. 22 authorization for the National Mediation Board to promulgate a regulation designed to protect its processes. And we think, quite beyond that, that there is a genuine and recognized evidentiary privilege, quite apart from the Governmental nature of it, which requires that mediation and mediation functions be kept completely confidential.

And finally, we are dealing with a Government Agency engaged in this, what is for the Government, extremely unusual situation of standing between private parties and trying somehow to bring them together by almost any means that anyone can think of. The Board, as a Board, has to deliberate and plot tactics and methods of
336 handling each individual case, of instructing their Mediators and of trying to influence the parties to come to agreement.

Its deliberations are certainly a matter which are privileged. Since neither the Board nor its members' minds can be probed in any event under the doctrine of the *Morgan* cases, at 304 U.S. 1, and 313 U.S. 409,—these are cases which bar attempts to go to an official and ask him why he has decided this or how he decided that or how he deliberated it. We don't probe the mind that decides, that has the responsibility for deciding. You may set aside his decision in some way—

The Court: That doesn't have much bearing on asking Mr. Thompson what occurred or asking for documents that bore on what occurred.

Mr. Shapiro: Now, we turn to the specific questions, Your Honor: "With those who do or those who don't take notes of meetings, do you find that this interferes in any way with the course of negotiations?"

I objected and directed the witness not to answer that, because I felt that it related intimately to the mediation process.

337

Then there's a series of questions that follow about the Mediator's report to the Board, about what he has accomplished and what he hasn't accomplished and what difficulties he's met with, or what his problems and recommendations are.

Now, to require that to be made public is again to defeat the effectiveness of the Board, because, if it can be done here, I think it can be done elsewhere.

Now, there was a question asked Mr. Thompson about his experience as a Meidator and whether Reporters had sat in on mediations on various occasions. Later on in the course of the deposition, I think Mr.—that question was later answered, since, as I recall the testimony, I started to object and then revised my judgment on it, and Mr. Thompson was able to answer. The question was:

"Now, in your personal experience as a Mediator, Mr. Thompson, have you had any occasion on which a reporter was present during negotiations or mediatory proceed-

ings at any stage whatever in your own personal experience?"

338 I objected and Mr. Devaney and I exchanged views on the subject, and it ended with my saying: "I will let Mr. Thompson answer in general terms if he can recall."

And Mr. Thompson then answered:

"I cannot recall any case I ever mediated where a reporter was present."

This is page 43 of the deposition.

So that I think Mr. Devaney did ultimately get the answer to that question.

Now, I'm just going through these questions individually. He was asked:

"To your knowledge—"

I'm going to shorten the question slightly so I don't have to read it all. He was asked whether he knew whether any—whether he had been informed by any member of the Board of a conversation that mediation has proceeded in other cases, in the presence of reporters. And I objected to that on the ground that it called for a communication between the Executive Secretary and a member of the Board; and of course, I think it's a hearsay matter anyway and I would object if the answer to that question were atempted to be introduced in this proceeding.

339 Again, I think communications between the Executive Secretary and members of the Board about what the Board has done in the mediation are and should be privileged matters.

Now, he was asked reasons why certain cases involving the International Assoication of Railway Employees were docketed by your Board—I'm sorry.

"Are there any reasons, Mr. Thompson, why these particular cases, including five cases docketed by your Board on or after January 1st of 1964, were assigned to a Mediator, whereas cases going back earlier in 1963 and one in 1962 have not been assigned to a Mediator?"

Again, this goes to why the Board has assigned the case or not assigned the case. It also goes, not to—well, it relates really to the Board's deliberations once more.

Now, the fact of the matter is and this record will show that, as to the particular rule changes we are involved with here, the Mediation Board has not sent a Mediator.

That's plain; we don't deny it. And it's our posi-
340 tion that as a legal matter that's irrelevant to the issues in this case. To take this irrelevant issue and then to permit Mr. Thompson, as the Executive Secretary, to try and recount what the Board itself has deliberated on after Judge Curran has held that the Board members themselves need not give testimony on this matter, would—

The Court: Is that the extent of this Order? You never did get around to telling me what it was.

Mr. Shapiro: His Order—

The Court: It is not attached to this deposition or otherwise made a part of this record, is it?

Mr. Shapiro: No, Your Honor. I have a copy. Now, the Order—I have a copy, not certified, just a working copy which I can make available.

The Court: At any rate, he relieved the three Board members from appearing; is that right?

Mr. Shapiro: He did. Now, we represented in
341 that argument, Your Honor, that Mr. Thompson would be available to testify on matters not privileged. And the thing that I was trying to achieve, I don't know if I was over-zealous on some occasions, but the thing I was trying to achieve was to prevent the carrier from exploring through Mr. Thompson the matters which they couldn't explore with the members of the Board, that the privilege that we intended to assert was intended to be coterminous with what we hoped was Judge Curran's grounds for decision.

Now again, I should state that all that Judge Curran's Order states is that the subpoenas directing the appearance of the Chairman and members of the National Medi-

ation Board, taking their oral deposition, be, and the same hereby are, quashed. Judge Curran ruled from the Bench. There was no other opinion, other than his decision, and we could not explore his deliberations on it.

The remainder of these questions, I think, go along the same line. Now, there may be one or two, I think, on which I have been over-zealous. I'm not quite sure without going through them more carefully than I can at this time; but I don't think that we've got a situation at
342 this time in this proceeding that requires that we suddenly stop and wait for Mr. Thompson's answers. This law suit is going to go on, I expect, if Your Honor doesn't grant the Motion to Dismiss or, rather, hold that you have no jurisdiction; and if it does continue, there will be further discovery on both sides, I have no doubt. This matter has come up in the middle of this hearing and it has come up on a few moments' notice. I think that this can be considered at a later time in any event.

Now, if it's insisted that these questions are vital to the carrier's defense, we insist that they are not vital, that they are not germane to any factual matter that's involved, we think that these matters are privileged because of the very nature of the Mediation Board's functions.

There remains a further matter that, if the witness is to be directed to answer these questions, since they relate to matters which we believe fall within the regulation of the Board, he would have to apply to the members of the Board for permission to answer. If he were directed not to answer by the members of the Board, the Government would probably be required to file a formal claim of privilege.

343 Now, under the case of *United States* v. *Reynolds*, and I confess I have forgotten the citation of it—

Mr. Edelman: 345 U.S.

Mr. Shapiro: I'm told it's 345 U.S. 1.

It's laid out that when the Government makes a formal claim of privilege, the matter must be considered person-

ally by the head of the agency involved and he must make his claim in writing in a document filed with the Court.

And we would ask that this opportunity be accorded us.

I think these matters could be more—as effectively considered in the District of Columbia where the witness is available and where he will be able to consult with the members of the Board in the event the Court should decide to direct him to answer any of these questions, so that the Board can finally review my claim of privilege on its behalf and decide whether they want to assert it or not.

Now, that has been addressed to the Motion to Compel Mr. Thompson to answer, even if he is not present
344 here.

There is also the Motion for Production of Documents, which has just been served. Glancing over it, it appears to me that most of what is sought relates to matters of communication between the Department of Justice and other Government Agencies.

Now, there is a well-established and recognized privilege with respect to documents in a law suit or no, and this privilege is recognized even though there is a case in which the United States is the plaintiff. At least, that is my understanding. This is the matter of inter-agency communications and recommendations.

There is a case, *Reynolds Aluminum Company* v. *United States*, in the Court of Claims, decided by Justice Reed, sitting by designation. And my recollection of the citation, although this may be faulty, is that it's in 153 F. Supp.

Mr. Devaney: Federal (2nd) or Federal Supplement?

Mr. Shapiro: It's Federal Supplement.

345 Mr. Edelman: 157 F. Supp.

Mr. Shapiro: I'm sorry, 157 F. Supp. 939. I'm giving the completely wrong citation. The name of it is *Kaiser Aluminum and Chemical Corporation* v. *United States.*

The Court: What is the name?

Mr. Shapiro: Kaiser, K-a-i-s-e-r.

The Court: Kaiser Aluminum instead of Reynolds Aluminum?

Mr. Shapiro: Yes, sir, and it's 157 F. Supp. 939, decided by Mr. Justice Reed, sitting by designation.

The Court: Rives?

Mr. Shapiro: Reed.

The Court: Reed, oh! Mr. Justice Reed.

Mr. Shapiro: Mr. Justice Reed.

Now, I do want to state, in the course of that
346 case, the United States was a defendant. The United States is always a defendant, of course, in the Court of Claims. But he does review there the considerations relating to the privileged nature of communications between Government Agencies.

I think the second item listed in the demand for production is covered both by the privilege—well, it's covered by the same thing, this privileged nature of communications between Government Agencies. The Department of Justice is, after all, a legal agency and most of our communications with other agencies deal with legal questions.

I think I would invoke as well the classic lawyer-client privilege for the Department, since this is definitely involved.

The third item:

"Minutes of all Executive Meetings of the National Mediation Board from January 1, 1963 to date dealing with Florida East Coast Railway Company."

Again, the considerations which I have indicated earlier with respect to Mr. Thompson's affidavit—their position, would apply to this—deposition, would apply to this question of minutes of executive meetings, privileged
347 and confidential nature of Mediation Board's functions.

And the same thing would apply to the fourth item:

"All reports of Mediators from January 1, 1963 to date."

Again, as a procedural matter, these matters can't be made available until the Board has had a chance to examine.

We have had occasions on which agencies have waived privilege on certain matters. Perhaps this is such an occasion. If it's not such an occasion and the Court should not agree that the Mediation Board's function is privileged by its very nature, then a formal claim of executive privilege might be made after consultation.

The Court: Do any of these documents called for, so far as you can see, fall within 1202.15(b), Non-Confidential Records?

Mr. Shapiro: I don't—

The Court: I can't see that any of them—

348 Mr. Shapiro: I don't believe they do. I'll be happy—

The Court: This says:

"The formal documents—such as the invocation or proffer of mediation, the reply or replies of the parties, the proffer of arbitration and reply thereto, and the notice of failure of mediatory efforts—in cases under Section 5, First, of the Railway Labor Act, as amended, are matters of official record and are available for inspection and examination by persons properly and directly concerned at the offices of the Board in Washington, D. C."

That's the non-confidential.

Mr. Shapiro: That's right.

The Court: And sub (c) goes into what they classify as confidential mediation records.

Mr. Shapiro: Some of the items in the first para-

349 graph of the Motion for Production may come within that rule and we would be happy to make anything that comes within the first paragraph of the rule available.

The Court: I do notice that CFR gives the authority for 1202.1 to 1202.15 as 45 U.S.C. 151-163, rather than 5 U.S.C. 22.

Mr. Shapiro: I think the reason that is done, Your Honor, is that the Board considers the definition of its functions in the Act to generate this requirement of confidentiality. They think that this is a natural concomitant of their role.

The Court: Yes, sir.

Mr. Shapiro: I do not know at this moment of any express language in the Railway Labor Act which declares the Board's function.

The Court: It would be in Section 5 if it was there, I suppose, wouldn't it?

350 Mr. Shapiro: I think it would be; that's where the Board's general role is described. And glancing at Section 5, there is simply a description of the Board's duties to attempt to bring about an amicable settlement through mediation, its duties to interpret certain documents and certain other matters. There's no express provision dealing with confidentiality.

Well, Your Honor, I think it's a question of whether we take up Mr. Thompson here and now, whether we consider any of these questions relevant to any factual matters involved in this litigation or to any factual matters involved in this application; whether the Mediation Board's functions are such that we have to recognize the privilege for it, to whether inter-agency communication and the deliberative nature of the Board's activities are privileged and whether the Government will be given an opportunity to make a formal claim of privilege in the event that you reject the contentions that I have advanced.

We believe that certainly the Motion to Compel Mr. Thompson to answer should be denied at this time and that the matter should be taken up in the District of Columbia.

351 I think that the Motion for Production of Documents should be denied, except with respect to documents which fall within Paragraph (b) of 29, Code of Federal Regulations, 1202.15. I might state that most of the—that the letters and correspondence which are germane to this litigation, I think are already in the record.

Now, of course, this is our judgment as to what is germane but the invocation—

The Court: All you thought were germane were made exhibits in Mr. Thompson's affidavit?

Mr. Shapiro: If further matters dealing with the Mediation Board's practices and procedures, with its failure to mediate in the matters involved—and I don't think it's a failure because the carrier is in violation of the Act and the conditions for mediation do not exist—that if further documents and the like are introduced on this, we will undoubtedly in the course of the carrier's defense make our objection on grounds of relevance and materiality.

352 Mr. Devaney: Your Honor, if I may make a very brief response to a couple of points that Mr. Shapiro made?

The Court: Yes, sir.

Mr. Devaney: First of all, I note that in his quoting from the Code of Federal Regulations, that he very correctly read but I don't believe that he emphasized very strongly and I would like to underscore it a little bit, that that says it shall not be needlessly—needlessly disclosed. So that even what he is saying and even if this has the application that he says it should have, they have not made any ruling here that this barred. They merely say that it shall not be needlessly disclosed.

The Court: That's in the declaration of policy?

Mr. Devaney: Yes, that's correct.

The Court: Under (a).

Mr. Devaney: Shall not be needlessly disclosed.

353 Now, when we filed the notice to take these depositions, Your Honor, we filed it in this Court and the Government first moved to dismiss or to quash the notice, because they said we hadn't waited the 20 days after the complaint had been filed.

First, if we waited 20 days after the complaint had been filed, this would be after the Motion for Preliminary Hearing.

The Court: I think they recognize that doesn't apply to a defendant anyway.

Mr. Devaney: It does not. I merely say that—

The Court: They withdrew that in some way.

Mr. Devaney: That was withdrawn. Then they brought —they filed a Motion to Quash in the District of Columbia. Now, their Motion to Quash was served on me some time after 12:00 o'clock and we were before Judge Curran at 1:00 p.m.

Now, I merely point this out that some of the things which they have inferred here that we have somehow
354 not given them adequate opportunity, I don't believe is sustainable on the record.

Now, Mr. Edelman, before Judge Curran, said this: I have the transcript and if Your Honor would like to read it, I would be delighted to leave it with the Court, but on page number 30—

The Court: I take it there is no objection to it being read into the record?

Mr. Shapiro: No.

Mr. Devaney: He says:

"Briefly, in one sentence, my position is that these subpoenas must be quashed because the Board is an extremely busy agency composed of presidential appointees with a heavy docket which would be severely hampered if its members could be deposed in the absence of great need and importantly in this situation because Mr. Thompson stands ready to testify as to all matters not privileged which relate to the official activities and records of the
355 Mediation Board."

Now, he submitted with that an affidavit by Mr. Gamser, in which he said—

The Court: Mr. who?

Mr. Devaney: Mr. Gamser, who was a member of the Board, and he said that he was the only one in Washington on this occasion and was therefore giving the affidavit as

a member of the Board on behalf of the Board. Otherwise, I presume it would have been given by the Chairman of the Board. And he said again that if Mr. Thompson is going to submit to this taking of the deposition, he knows everything and can testify about everything that we could and therefore it is not necessary for us to be present.

Now, we haven't asked Mr. Thompson anything that, so far as I can see, has any conceivable basis to any privilege, because it does not relate to any matter that involves necessary confidentiality because it has been disclosed to the Board by some third party. And we believe very much that it's certainly material to this action that these questions be answered.

356 Now, we have contended here—Mr. Shapiro stated that the purpose of the Government in bringing this suit was to protect the functions of the Mediation Board. Then he has described that one of the elements of the complaint here is the portion which deals with the operation of the Railroad from the time the strike occurred, and it resumed operations on February 3rd not in compliance with the provisions of the Act.

Now, I don't think that the functions of the Mediation Board can possibly be said to have any relationship to that at all. And Mr. Edelman, before Judge Curran, on page 6, stated:

"The first temporary conditions of employment has no relationship to the National Mediation Board since the Board was never, since a Section 6 notice was never served and therefore the Board's processes have never been invoked."

Now, these matters which we have asked about do relate to specific questions which have been raised by the Government in their complaint. Now, one of the things con-

357 cerning mediation, on October 11th—and this is Exhibit No. 8 to the affidavit of Mr. Thompson,

attached to the complaint, beginning with the last paragraph, which says:

"The Board has docketed Mr. Leighty's application for mediation as NMB Case No. A-7027 and a Mediator will be assigned to handle at a date consistent with the Board's other commitments."

Now, there is nothing in this to indicate that the Board in October—in fact, the first time that they have announced any such policy was in Mr. O'Neill's letter to the company on May the 14th, 1964, and it has been reiterated here by Mr. Shapiro, that when a matter is in litigation and the Board doesn't assign a Mediator. Back in October, all of the positions were not in agreement, Your Honor. The Board was taking the position that it properly had the case.

Now, Mr. Wyckoff has already testified that there has been no refusal by the carrier to refuse to go forward with this mediation.

Now, for the Mediation Board to take the position at one time that "We are going to send the
358 Mediator", and six months later or seven months later to come before this Court and say, "No, that policy, we're not going to follow it any more".

And one other thing, Your Honor: In this deposition Mr. Thompson very clearly indicates that unless you can obtain an answer from the members of the Mediation Board or the Executive Secretary, there's no other place you can turn. They don't have any regulations. They don't have any rules. So there isn't any other way to get the information. You don't know what has occurred except they have done or have not taken some action. This is why it becomes so important that you cannot develop any of the facts concerning the Mediation Board except through them, because they close the door to you.

Now, it's also strange that, back in December, Mr. O'Neill was here. Now, they found no difficulty in having a member of the Mediation Board at this time testify con-

cerning activities relating to that litigation. We're not seeking, we do not want material in this case that was disclosed to the Board in a confidential nature by other people, and if we have asked any questions that lead to this, we can argue about that later. We have
359 studiously avoided doing that.

Now, on the Motion to Produce or the Motion to Produce the Documents, I think, again, the materiality of the material is clear. I think, in the minutes of the Executive Session relating to the Florida East Coast, I think we are entitled to that. That has been put in issue in this case and there can be no reasonable basis for claimed confidentiality. And the reports of the Mediators as they relate to the Florida East Coast, this is certainly in issue; we have every right to examine the report of the Mediators as relates to this railroad.

We don't want any disclosures made by the Mediator or made to the Mediator by the unions. We would have no objection to that being deleted; but the rest of that, we think is material and we have a right to know what he reported back to the Board.

Now, there is no material here that I can see that has any question to this materiality but, as to Mr. Shapiro's statement that we ought to go back and that we ought to have the Board consider it, we've already—they've
360 already given the affidavit of Mr. Gamser. They've already said in effect, "We are tendering Mr. Thompson. He will answer all the questions."

The Court: All questions not privileged.

Mr. Devaney: Well, that's right, but if they are asserting questions of privilege, I think that they've already asserted the question of privilege and it's now for this Court to determine whether these do relate to matters that can properly be made privileged.

And the case that I referred to by the Fifth Circuit earlier is 294 F. (2d) 868. That was the *NLRB* v. *Capitol Fish Company,* decided in 1961.

The Court: 294?

Mr. Devaney: 294 F. (2d) 868. Now, that case says that 5 U.S. Code, Section 22, clearly gives agencies the right to issue housekeeping regulations with respect to the retention and disclosure of certain documents, but the ultimate question or the ultimate determination as to what is confidential and what is privileged is for the
361 Courts to determine. That's why we say again, Your Honor, that this is properly before you. It should be decided now. We are entitled to the information and we believe that it will not unduly delay the proceedings to have them go forward and answer the questions.

The Court: To have Mr. Thompson, you mean, answer the questions?

Mr. Devaney: To have Mr. Thompson answer the questions would not unduly delay this proceeding at all.

The Court: There's one further matter, please, Mr. Devaney.

Your Rule 34 Motion, at the bottom of the Motion, I suppose in an attempt to show good cause for the Motion, it says:

"Plaintiff, the United States of America, has custody and control of the foregoing documents. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached."

362 I don't find Exhibit A filed with the Motion.

Mr. Devaney: I apologize for that. After having given this, the Exhibit A was not executed and was therefore not signed.

The Court: What is it, an affidavit?

Mr. Devaney: It's an affidavit, yes, sir, Your Honor.

The Court: You can summarize it and supply it later.

Mr. Devaney: It was the affidavit of Mr. Wyckoff and it merely summarizes the material requested is within the possession of the United States Government, that it is

material and relevant to the issues in this case, and therefore requests the production of it.

The Court: Gentlemen, the Motion to Compel Answers by Mr. Thompson, without taking these questions up in detail, I consider these questions to be irrelevant and immaterial to this action, at this stage of the proceed-
363 ings at least, and this is said without prejudice to a further application to take these during the further course of the law suit, to get answers to these questions. I put it on the ground of relevancy. Don't sustain the claimed privilege. And in general, there may be some of these, some of them that would come under—come broadly under a proper privilege but, in general, it does not seem to.

My view about it is simply this: That if relevancy were shown, I think that the privilege is destroyed. If it's necessary to decide this law suit, why, we ought to bring it in here and put it on the table.

The same considerations govern the decision to deny the Motion for Production of Documents. That is granted to the extent that they are relevant. Actual formal documents in the mediation proceedings that haven't been attached or produced, if anybody can specify any of those, they should be handed across the table. As far as I know, unless somebody calls my attention to one that has not already been produced, we will consider that Motion complied with to the extent that I consider it needs to be complied with at this stage of these proceedings.

364 Again, this denial is without prejudice to the right to renew the motion at a further stage of the proceedings. It doesn't comport with my theory, at least, of the way to try and determine a Motion for Preliminary Injunction to be met in the middle of the hearing with a Rule 34 Motion for a lot of documents that are at some other place and would certainly require some time to assemble and produce. I'm not convinced that relevancy is present anyway.

Now, there was a—

Mr. Milledge: There was a subpoena issued.

The Court: Sir? I see you have a subpoena duces tecum issued here which maybe should be reached and—

Mr. Milledge: If I might just suggest this: We have a Motion to Quash but, rather than to have to rule on it, the people are all here. We are probably going to break for lunch before too long. If Mr. Devaney would tell us what specifically is required, perhaps we can have it after lunch and not have to get—

365 The Court: Now, you've produced one—

Mr. Milledge: One item.

The Court: Item No. 1 in each instance, as I understand it, on yesterday.

Mr. Devaney: Yes, Your Honor.

The Court: That is the Constitution and the By-Laws.

Mr. Devaney: That's correct.

The Court: All the rest of it has been pushed along in front of us to dispose of either now or later during the hearing. I just observe in a preliminary way that it asks for everything, and there must be some things that you can specify that you need for this hearing, rather than this scattergun, shotgun subpoena.

Mr. Devaney: Your Honor, if Your Honor will consider—

The Court: You've covered the whole thing with this one document.

366 Mr. Milledge: The room wouldn't hold it all, Judge.

Mr. Devaney: The nomenclature is almost certain to vary from one union or one group to another.

The Court: Yes, sir.

Mr. Devaney: What we were interested in primarily were the Constitution and By-Laws; second, any documents including minutes of meetings at which disciplinary action had been taken, instituted, relating to the employees of the Florida East Coast since January 1, 1963.

The Court: Disciplinary action by the union?

Mr. Devaney: Yes, expulsion. We are not concerned about their internal matters of conduct, except as it relates to this.

The Court: Dropped for not paying dues, or something, you don't care about that?

367 Mr. Devaney: No, except as it—

The Court: Primarily in connection with the strike activities or related activities?

Mr. Devaney: That's correct.

Now, any other formal resolutions they have, or formal documents that relate to the strike itself. Now, we know that various documents were issued in the form of strike instructions, whether some of them may have been called "Strike Call documents", but that sort of document that relates to the action of the local union or the international union with respect to the recognition and conduct of members in connection with the strike on the Florida East Coast.

And the fourth general category would be the applications, if any, for membership or action that they've taken on applications for membership of anybody working for the Florida East Coast since January 23, 1963.

Not having that before me, those, in general, were the items or the matters relating to those categories that we were primarily interested in. Now, whether they are

368 called letters or whether they would be called resolutions or whether it would be a minute of a meeting as relates to one of these matters, we have no way of knowing. It's those general categories.

The Court: You want it whether it's in the form of a letter, a minute of a meeting, a resolution or memorandum?

Mr. Devaney: That is correct, Your Honor. And not knowing what it might have been called or what form it might have taken, we have of necessity had to use the broad coverage to make sure we have named the various things that would be involved in this.

Now, the final item, which is another category in this cause, are the expenditures.

The Court: The what?

Mr. Devaney: Their expenditures, that is, their records showing the income and outgo of their money since the strike began, receipts and expenditures.

Mr. Milledge: That's got about as much bearing—
369 I mean, that is—in the first place, the records are enormous on that, but that has absolutely no relevancy to this proceeding whatsoever. That's in really, Your Honor, the same category as that requested about strike activities. The eleven cooperating non-operating unions have been on strike since January 23rd and they still are, that's of '63, so you just are getting into the affairs of the unions there.

The only legitimate inquiry, if that is, whether they are on strike or not—and, of course, they are, there's no dispute about that.

The Court: What about the information he has asked for with respect to disciplinary action?

Mr. Milledge: It's our position that it's not relevant but we got into it in the BRT thing and I don't think we will probably have any problem about that. I don't think any has occurred.

The other thing.

The Court: Well now, there is a classification of documents called for here that, if Mr. Devaney alluded to it, I didn't catch it. He wants correspondence, memo-
370 randa and any other documents or records concerning, relating to or evidencing communication of any sort, whether in person, by mail or by telephone, between any member or officer of your organization and any member, officer or employee of the National Mediation Board, the Department of Justice, or any other department, agencies or office of the United States.

If you covered that, I didn't catch it.

Mr. Devaney: No, I'm sorry, I had forgotten that one, Your Honor, not having a copy before me. No, that is correct, that is the final category that we are interested in.

We feel that this does have a bearing. We have asked for it in these subpoenas because we feel that these people, in any communication at least that they directed, certainly is not a matter to which they can claim privilege; whereas the United States might feel that it could not disclose the same letter received from the union.

Now, we feel that this does have a very direct connection here as to the relationship between the unions and the plaintiff in this case, between the plaintiffs themselves and between the plaintiff and the defendant in this action. And for this reason, we feel that the material is relevant and should be produced.

371

Mr. Milledge: He hasn't said anything yet, Judge, that goes to any materiality or relevance to what issue in the case might this have the remotest bearing. It's really just a fishing expedition to see if he can come up with something he hopes might—I don't know what he really hopes to find but there has been absolutely no showing of any materiality to any issue in this case.

The Court: Then he asks, down here in the last:

"Correspondence, memoranda, minutes of meetings, resolutions, motions and any other documents or records concerning or relating to the notices of July 31, 1963 or September 24, 1963 given pursuant to Section 6 of the Railway Labor Act by the Florida East Coast Railway Company or concerning or relating to the document entitled 'Conditions of Employment' dated September 1, 1963."

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Mr. Milledge: Well, that particular category, it's clearly too broad. What that would involve is the union meetings on how to respond to the notice and their own deliberations as to what action they should take, whether they should—there has been no suggestion what

materiality that would have. This is a group of people that have to decide how they respond to the railroad, and it would be like asking for the deliberations of Mr. Wyckoff in his personnel office as to what policies are involved.

There may be some more limited purpose but, in that as submitted there, it's—

The Court: Do you have any further comment on this?

Mr. Devaney: Your Honor, we aren't—we don't want to go into the end details in any sense that their decisions and deliberations of the unions as to what action they should take with regard to these notices, but there certainly is materiality here to the fact that these notices were received, the fact that various action was subsequently taken—and I don't refer now to the deliberations
373 as to reasons, what they should do; but these became crystalized at some point in various correspondence and decisions which they made. We believe this has a direct materiality to this case.

One of the contentions that has run through all of these cases has been the question of intent. And I think that this has a direct bearing on what the union understood, what they knew from the receipt of various notices, and what this really resulted in as far as a position; I think we are entitled to it. I don't have any interest in having the debates that went on in the meetings, the comments of the members in the meetings, beyond showing what their action was and to show this intent of the meetings.

In the BRT case, one of the contentions which the union made was that a certain—that the notice be given, had been superseded in some manner and yet they continued to bargain. They continued to bargain after all the activity that they complained of that had this effect had occurred.

Now, we feel that for the same reason that the only way you can show that, if a person is coming in and saying that he didn't know about something or it
374 didn't have this effect, we feel that this very material to show that they didn't have the slightest doubt that

it had precisely the effect that the carrier believed that it had. So for this reason, we think there is materiality, that the material should be produced.

The Court: Anything further?

Mr. Milledge: No, Your Honor.

The Court: Well, with respect then to the several subpoenas duces tecum, Category 1 has already been complied with.

The Motion to Quash is granted as to Category 3, Category 4, and Category 5.

As to Category 2, which deals with the expulsion and disciplinary action during the strike time, if it can be developed, if it is developed, when you have the individual witness who has been subpoenaed here on the stand, that there was some action, I would not limit your right to inquire about the disciplinary action and to call on the witness for relevant documents in connection with
375 it. So, to that limited extent, the Motion to Quash as to Category 2 is denied and you may go forward to that extent with that.

Now, do we have anything else that we should dispose of before you go into your factual case, or are you ready to go on and make your case?

Mr. Devaney: No. We, of course, filed yesterday, Your Honor, the Motion to Dismiss that we, of course, think—

The Court: Well, there again, at the time that the Government rests its case may be an appropriate time to talk about dismissing. As I indicated yesterday, I consider it better to carry it with the case, and I'll carry it to the close of your case and the close of the Government's rebuttal.

Mr. Devaney: I understand.

The Court: And I'll take it up at that time.

Mr. Devaney: We have nothing further in a preliminary way.

The Court: All right. Maybe it would be suitable to

take a recess at this time and let you sort of make
376 your plans on how you want to proceed.

Mr. Devaney: We would very much appreciate it.

The Court: Will an hour be long enough for a noon recess, or would you like a little longer?

Mr. Devaney: Well, it's now 12—

The Court: It's about 12:40. I was going to suggest we reconvene at 1.45. I can make it 2:00 if you think you need that much time.

Mr. Devaney: If it would be 2:00, it might be helpful, Your Honor.

The Court: 2:00 o'clock then, Gentlemen. Take an adjournment until 2:00 o'clock.

You gentlemen may leave your papers in here. I'll see that the room is locked up. Nobody will disturb them.

Thereupon at 12:45 o'clock p.m., on Wednesday, May 27, 1964, Court adjourned to be reconvened at 2:00 o'clock p.m., on the same day.

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377 (At 2:00 o'clock p.m., on Wednesday, May 27, 1964, pursuant to adjournment of the preceding session, the Court reconvened and the following further proceedings were had):

Mr. Devaney: The first witness I would like to call is Mr. C. A. DuPont.

C. A. DuPont,

having been produced and first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Devaney:

Q. For the record, would you state your name, please. A. C. A. DuPont.

Q. And are you affiliated with one of the labor organizations? A. I am.

Q. And which one? A. Electrical Workers.

Q. IBEW? A. IBEW.

Q. And what is your position with the IBEW? A. I am President and General Chairman of Local 888.

Q. And that is one of the locals representing em-
378 ployees of the Florida East Coast? A. That's correct.

The Court: 188, Mr. DuPont?

The Witness: Pardon?

The Court: 188?

The Witnness: 888.

The Court: 888, thank you. Where is that, St. Augustine?

The Witness: The Local Charter is in Miami.

The Court: At Hialeah; Miami?

The Witness: Miami.

The Court: All right, thank you.

And you represent the electrical employees at Miami, Jacksonville, New Smyrna, St. Augustine?

The Witness: On the Florida East Coast System.
379 The Court: The whole System?

The Witness: Yes, sir.

By Mr. Devaney:

Q. Now, Mr. DuPont, this is the document that I was furnished yesterday, which is your Constitution; is that correct? A. Yes, sir, that is our International Constitution.

Q. Is that a copy which we could have marked and introduced as an exhibit or do you want me to read the relevant provisons from this? A. Well, I would rather you read the relevant portions for the record. That's the only copy I have at hand.

Q. All right, fine.

The Court: Well, just for the purpose of this hearing and to be returned to Mr. DuPont at the close of the hearing, suppose we mark this Defendant's Exhibit A and let either side—

Mr. Devaney: Refer to it?

The Court: —refer to it and read from it. I'll see
380 that the Clerk is directed to return it to Mr. DuPont after we finish the hearing. I think we may as well have it here where either side can use it.

The Clerk: A in evidence.

(The referenced document was received and filed in evidence as Defendants' Exhibit A.)

Mr. Devaney: Will you mark this B?

The Clerk: Are you going to offer it right away?

Mr. Devaney: Yes.

The Clerk: See if they have any objection.

By Mr. Devaney:

Q. Mr. DuPont, I hand you this document and ask you if this is a letter which you wrote, of February 8, 1963, or a copy of the letter? That is not the original. A. Yes, sir. I would say that that is a copy of it.

Mr. Milledge: The Intervenors have no objection.

The Court: Mark it in evidence.

381 (The referenced document was received and filed in evidence as Defendants' Exhibit B.)

By Mr. Devaney: :

Q. Now, Mr. DuPont, this letter which has been marked for identification as Defendants' Exhibit B states that the employees that you represent have withdrawn from service and are not subject to call for service.

Now, could you tell us what that means? Does that mean what it appears to mean, that we weren't supposed to call them for work? Is that what that means? I just want to make sure we understand precisely what the words that you have used here intended to mean. A. Well, in this instance, it meant that the man had been—if I recall, if my memory serves me right, that a job had been awarded to an individual and he was notified to report for duty.

Q. It had been awarded, or a bid of the job had been posted for bid? A. The job had been posted for bid.

Q. Yes, sir. A. And it's not clear in my memory but the thing that I was trying to point out here is that the man was not subject to call, because we were on a legal strike.

382 Q. Now, were you saying, Mr. DuPont, that the company was not obligated to post these jobs for bid? A. I'm trying to get your line there. This is something that occurred over a year ago and I don't—would you ask me the question again, please?

Mr. Devaney: Would the Clerk read the last question back?

The Reporter: "Now, were you saying, Mr. DuPont, that the company was not obligated to post these jobs for bid?"

The Witness: No, sir. I was not saying that.

By Mr. Devaney:

Q. Well, that's what I was trying to understand, what precisely were you saying? A. (no response)

Q. You say they were not subject to call. We had posted jobs and you say that they were not subject to call. And I'm merely trying to understand precisely what you intended by your statement that they were not subject to call? A. Without having reference to the bulletin and an opportunity to go over this thing, I can't tell you what I did exactly have in mind at that time.

383 Q. Now, if we may digress one moment: Let me hand you the Constitution, which has been marked for identification as Defendants' Exhibit A. And I have the notation of the sections over here.

Will you look at page 78. Do you have that? A. Yes, sir.

Q. And this is Article—that would be 27, Section 2, subsection 9. A. Yes, sir.

Q. Now, this reads that—I'm going to quote it: "Working in the interest of any organization or cause which is detrimental to or opposed to the IBEW."

A. That's correct.

Q. Now, in this Article, is this one of the grounds, Mr. DuPont, that a member would be subject to expulsion if he engaged in this conduct? A. Yes, sir.

Q. Is working for an employer who is engaged in—on which the IBEW is engaged in a legal strike considered a violation of that subsection? A. Yes, sir.

Q. Now, turning to subsection 20, on page 79— A. Yes, sir,

Q. That provides:

384 "Working for any individual or company declared in difficulty with a local union or the IBEW in accordance with this Constitution."

A. Yes, sir.

Q. Now, would that "declared in difficulty", would that encompass a strike authorized by the IBEW for your local union? A. Yes, sir, it would.

Q. Now, is it correct then, Mr. DuPont, that any member who worked during the period of the strike would be guilty of one or more violations of the Constitution and would be subject to expulsion by the union? A. That's right.

Q. Now, if a member is subject to this expulsion from the union, is a person who has not been a member of your union who is now employed by the Florida East Coast eligible for membership in your union? A. Yes, sir.

Q. Under what provision? A. He can make application. Anyone can make application for membership.

Q. I understand. But would he be accepted for membership in view of the limitations which say that if he

385 were a member he would be expelled for having worked for the employer during the period of an authorized strike? A. Well, I can answer that by saying that he would have to be voted into the organization and the will of the membership would have to govern that.

Q. Have any employees who have worked for the Florida East Coast during the period of the strike been admitted to membership in the IBEW? A. No, sir.

Q. Now, Mr. DuPont, I have not written this down but I am going to read from Article 22, Section 4, which deals with the obligation. It says:

"Each applicant admitted shall in the presence of members of the IBEW read and sign the following obligation."

There is a place for I, and the name:

"in the presence of members of the International Brotherhood of Elecrtical Workers promise and agree to conform to and abide by the Constitution and Laws of the IBEW and its local unions. I will further the purposes for which the IBEW is institution. I will bear true allegiance
386 to it and will not sacrifice its interests in any manner."

Now, isn't it true, Mr. DuPont, that when it says "conform to and abide by the Constitution", that it would mean that this obligation of membership would immediately include the obligation that we referred to earlier in Article 27, Section 2, subsections 9 and 20, with regard to a member who works for an employer during the period of an authorized strike?

I don't mean to jump on you. A. Can you break that down a little bit?

Q. Yes, I can.

Earlier, we were talking about a person who is already a member? A. Yes, sir.

Q. And I asked you if that person worked for an employer with respect to whom the IBEW or the local union were engaged in an authorized strike, would that person then violate the Constitution and be subject to expulsion? A. Yes, sir.

Q. You said yes? A. That's right.

Q. And that was Article 27 of your Constitution? A. Yes, sir.

Q. Now, the obligation of a member, when a man
387 becomes a member, he says, "I will abide and be subject to the provisions of the Constitution"? A. That's correct.

Q. So that I'm asking you, that since this obligation requires that a man who wants to be a member has to say that, "I will do this"? A. Uh-huh.

Q. Would it not follow that a person who is now working for Florida East Coast could not while continuing to work for Florida East Coast become a member of the IBEW, as long as this authorized strike is in continuance? A. Well, that's a good line of reasoning.

Q. Well, is it correct? Is it a correct line of reasoning? A. I would say that a person that made application, if he was voted into the organization, would take that obligation. He would, in turn, be subject to the terms of that Constitution and be guilty and be subject to discipline. That's a long line of reasoning but—

Q. But to put it another way: If a person were taking this obligation, he could not in effect take the obligation while he is working for an employer against whom the IBEW is on strike? A. Not if he's a man, he
388 couldn't take it. I know some people that could, I think.

Q. All right. Now, the provision we read earlier was Article 27.

Isn't it true, Mr. DuPont, that Article 17, Section 12, appearing on page 48, has a similar provision that no local union shall allow any member to work for any employer declared in difficulty? A. Yes, sir, it's Section 12.

Q. And that would—difficulty would include an employer against whom the local union or the IBEW was engaged in an authorized strike? A. Correct.

Mr. Devaney: And I'll not read these, Your Honor, but I will note for the record that Article 9, Sections 4 and 6, are provisions that relate to the trial of any local union or member charged with injuring the interests of the IBEW, and so forth.

And that Section 6 is to suspend or revoke the charter of any local union—and I don't know what the IS—International Secretary?

The Witness: Secretary.

389 Mr. Devaney: Reject the per capita tax from any local union that fails or refuses to observe the laws and rules of the IBEW.

By Mr. Devaney:

Q. Now, Mr. DuPont, do you recall that proceedings were brought against an individual by the name of Elliott? A. Yes, sir.

Q. Do you have any of the documents relating to Mr. Elliott here? He was expelled from the union or was fined and expelled, isn't that correct? A. That's correct.

Mr. Shapiro: Your Honor, I would like to make an objection.

I don't see what relevance or materiality this entire line of questioning has with the issues in the law suit. The fact that the labor organization is on strike is established. I assume that the carrier is not contending that, every time a labor organization is on strike, that it's obliged to accept—it's obliged to bring members of the union back to work while the strike is in progress.

I'm just unable to see what the relevance and materiality of the line is.

390 Mr. Devaney: Your Honor, the relevance and materiality is this: One entire count of this complaint deals with union shop agreements that existed between the Florida East Coast and the various unions.

Now, a part of the consideration is whether or not, completely and entirely apart from any action by the Florida East Coast, the organizations have not themselves, at least during the continuance of the strike, have not suspended or rendered unenforceable their union shop agreements as to the people who are now working.

Now, as to the question of the bargaining, this is—it is true that this is also present as to whether or not the agreement was terminated by the Section 6 notice, but if the agreement has become null and void and unenforceable,

that occurs by operation of law apart from anything that the carrier may have done in this case.

It also goes to whether or not if any order were to be issued, as to the nature and the extent of the order requiring immediate compliance with the terms of the union shop agreement. We feel that this is very material to what has occurred. We certainly agree with Mr. Shapiro. We
491 aren't complaining. We have no disagreement with the right of the union to withdraw its members on an authorzied strike. We are not saying that they are violating the law in any respect by not coming back to work, but we do say that the terms, the enforcement, the effect to be given to their union security agreements during the period of this strike is a matter which must be determined and we have a right to investigate and to find out what has occurred to those agreements during the period of this strike.

Mr. Shapiro: Your Honor, we believe that this is not either relevant or material.

First, insofar as a union shop count is included in the complaint, it is addressed to the fact that the carrier, as a result of its Section 6 notice of July 31, 1963, has purported to abrogate the agreement, to cancel it.

Now, the argument is made that the complaint also—that the strike has rendered the union shop agreement unenforceable. Whether it's enforceable or not is not the basic issue involved in the complaint. It's whether it has been cancelled prospectively, and that is what we are trying to remedy here.

392 The argument that the agreement becomes by virtue of the strike null and void and unenforceable, I think is a completely untenable contention since it would mean that in every strike in which somebody had a union shop agreement, by the very act of striking, they would nullify the union shop agreement.

Now, that is, I think, on its face an absured contention.

Finally, the union shop agreement exists, Your Honor,

by virtue of the operation of Section 2, Eleventh of the Railway Labor Act. And Section 2, Eleventh of the Act expressly provides that if members—I'm sorry:

"If employees have a union shop agreement"—

and I'm now reading from Section 2, Eleventh, (a) and the proviso therefrom:

"that no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership is denied
393 or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments, not including fines and penalties, uniformly required as a condition of acquiring or retaining membership."

Now, in the light of this provision of the law, I think it clear, that if the striking union rejects the application of a replacement worker because he is not on strike—

The Court: This isn't a question of rejecting an application. What he is asking him about is disciplining by expulsion a member who goes to work.

Mr. Shapiro: Well, I was referring to the entire line of questioning we've had here, Your Honor, and my contention is that, insofar as this union shop agreement is concerned, this line of questioning which has been developed here is just not relevant to the issues on the union shop count of the complaint.

2, Eleventh of the Statute expressly takes care of the situation where employees are denied membership in a striking union which has a union shop agreement.
394 I don't think it can follow as a matter of law that every strike by an organization with a union shop agreement would automatically result in the cancellation or nullification of the agreement. And our complaint is concerned primarily with—in fact, it is solely with the attempt of the carrier to abrogate this union shop agree-

ment, to cancel it, as they have purported to do. So we don't think this is involved in our law suit.

The Court: I'm going to—I think I must permit Mr. Devaney to put this in the record, either in the form of a proffer which I exclude or in some way to put it in here; and it may as well go on in and be considered for whatever legal weight we finally give it.

I'm not prepared to say in advance of legal argument whether I will restrict the issues as narrowly as you would seek to restrict them. I think we may as well have this in the record for whatever weight it may later be determined to have, and that would apply—I suppose that Mr. Devaney expects to call other chairmen or other local chairmen or president or representatives of these various crafts that he has subpoenaed here and he may want to show
395 some others. This, we will say, applies to all those without repeating the argument or the objection.

Mr. Shapiro: Thank you, Your Honor.

The Court: Did the question—You gave the name of a man?

Mr. Devaney: Yes, sir.

The Court: Whether or not he had been disciplined. I think that's when the—

Mr. Devaney: I'm not certain whether it's J. O. or J. V. Elliott.

The Court: Ellis or Elliott?

Mr. Devaney: Elliott, E-l-l-i-o-t-t.

By Mr. Devaney:

Q. Do you have any of the documents relating to this case with you, Mr. DuPont? A. Yes, sir.

Q. Would you mind bringing them to the stand, please.

A. (Witness left the stand, obtained instruments, and returned to the stand.)

396 Q. Now, do you have those documents, Mr. DuPont? A. Yes, sir.

Q. May I see them, please. A. (Producing instruments)

Q. Thank you. Are these your only copies, Mr. DuPont? A. Yes, sir, they are.

Q. Anything here—would you have any objection if there is—I haven't looked at them—if we simply had them marked and then we will withdraw them and have copies made and return any originals that we introduce? A. It's all right with me.

Q. Now, the first document is the charge; is that correct? A. Yes, sir, that's the original.

Q. And the second letter here, this is the minutes—represents the minutes of your meeting, does it? A. Yes, sir, that was a copy of the minutes that the Recording Secretary sent me. Of course, he kept the original copy, the original of that.

Q. Then this is the letter to Mr. Elliott by Mr. Johnson? A. Yes, sir.

397 Mr. Devaney: Now, I have no objection to putting it in but I'm not going to do so at the moment since I believe that everything that's material is in the minutes of this meeting.

Is that right? Do you want this put in Mr. DuPont? I will be glad to if you would like to have it marked.

The Court: Maybe counsel should answer that question rather than the witness.

Mr. Milledge: Just put the whole thing in. It's the complete record pertaining to the one item.

The Clerk: Defendants' Exhibit C.

(Thereupon, the referenced material was received and filed in evidence as Defendants' Exhibit C.)

The Court: This is received subject to objection.

Mr. Milledge: Your Honor, just for the Intervenors generally, we don't feel this is material. We argued that on the Motion to Produce.

398 The Court: You have the same objection, Mr. Shapiro made.

Mr. Milledge: Which is continuing?

The Court: Yes, sir.

By Mr. Devaney:

Q. Now, Mr. DuPont, I hand you this and ask if you are familiar with that document?

The Court: Is that a document already marked here or is that something news?

Mr. Devaney: No, it is not. It has not been marked, Your Honor.

The Witness: Yes, sir, I have read this.

By Mr. Devaney:

Q. You have read it? A. Yes, sir; not recently, but I have read it.

Q. All right.

Mr. Devaney: Have both of you seen it?

Mr. Shapiro: Yes.

399 By Mr Devaney:

Q. Mr. DuPont, while they are looking at that document, let's go back to the one marked Defendants' Exhibit C, which is the list of the various documents making up the record of Elliott which you handed me a few minutes ago. A. Yes, sir.

Q. Now, the minutes of the meeting provide in part: That the meeting was called to order at 8:00 p.m.; charges read as filed against J. O. Elliott, who has crossed picket line at Bowden Yards to return to work for the strike-bound F.E.C. Railway; these charges filed April 17, 1963, Article 27, Section 2, Paragraphs 9 and 20 of the IBofEW Constitution and Local By-Laws being violated.

Now, is there a—did you give me a local by-law? A. Yes, sir.

Q. And this is one of the documents that we have? A. Yes, sir, it is marked on the front sheet, Local 888, IBEW. It's on typewritten paper. It's not—

Q. Oh, it's typewritten? A. Yes, sir.

Q. I'm sorry. I find it now. That was one that had slipped by me. This is it? (Indicating) A. Yes, sir.

400 Mr. Devaney: Now, we marked the first one as Defendants' A. Why don't we make the Local as Defendants' A1?

The Court: This is the ByLaws?

Mr. Devaney: This is the Local Union's By-Laws, yes, Your Honor.

The Court: All right, it's A1.

(Thereupon, the referenced document was received and filed in evidence as Defendants' Exhibit A1.)

The Court: The same conditions about reading from it by either side and its withdrawal and return to Mr. DuPont at the end of the hearing, I suppose better be in effect.

The Witness: Yes, sir.

The Court: The same as they were for the Constitution.

Mr. Devaney: Mr. Milledge?

Mr. Milledge: No, sir.

By Mr. Devaney:

401 Q. This is one that I hadn't looked at.

Can you tell us offhand the provision of the Local By-Laws that would be involved, or do you remember offhand? A. I don't remember offhand, sir. It would be a similar rule to the International Constitution, because nothing therein contained can contradict the International Constitution. It has to conform with it. That's just recently been revised and it had to go back and forth, one thing and another; I couldn't tell you. It's not in very good shape, let's put it that way, but when I was called on to produce this, I had to produce what I had.

Q. But there is somewhere, and if I go through it I'll specifically call it to your attention, that you are referring or the Secretary was referring here to a similar provision in your Local By-Laws to those that we read from the International, relating to working during the period of an authorized strike? A. Yes, sir.

Q. Now, this says that he did not—
"Brother Elliott was notified"—
and did not report for hearing. It goes on to say:
"Discussions were had on charges as filed * * *; the decision of the Trial Board was guilty as charged, penalty to be imposed for above violations is expulsion from Local #888 IBofEW."
That's correct? A. That's correct.

Q. Now, was there a money penalty imposed on Mr. Elliott, or was expulsion the only penalty? A. That was the only penalty.

Q. Now, have there been charges against other members of the IBEW who have worked for the Florida East Coast during the period of the strike? A. No, sir.

Q. This is the only one? A. Yes, sir.

Mr. Devaney: You Honor, I move—I think most of them have been admitted but, if I've overlooked any, I move that Defendants' Exhibits A, A1, B and C be admitted into evidence.

The Court: They are in.

The Clerk: They're in.

Mr. Devaney: Fine.

The Court: They're in.

Mr. Devaney: I though I was correct but I—

The Court: The National Constitution and the Local By-Laws are to be returned. The others, I take it—

Mr. Devaney: Yes.

The Court: Well, I think the same thing about the disciplinary report and—

The Witness: Well, I have a copy of this.

Mr. Devany: We will withdraw that and copy it.

The Court: You will substitute a copy of that?

Mr. Devany: Yes, I shall.

No further questions of this witness, Your Honor.

Mr. Milledge: You can come down.

(Witness excused)

404 Mr. Milledge: Judge, if it would speed up the proceedings--

Mr. Devaney: I'm sorry—

The Court: Just a minute, Mr. DuPont.

Mr. Devaney: I'm sorry. We forgot this that Mr. Milledge still had. I did not want to mark this as D.

The Court: What is that?

The Clerk: Strike call and instructions pertaining to conduct of strike, dated January 16, 1963.

The Court: Is that identified as a document emanating from this union that he represents?

Mr. Devaney: Well, Mr. DuPont—

The Court: You havent's asked him about it?

Mr. Devaney: Yes.

405 The Court: Mark it D for identification and ask him.

(The referenced material was marked Defendants' Identification Exhibit D.)

C. A. DuPont

resumed the stand and further testified as follows:

Further Direct Examination

By Mr. Devaney:

Q. Now, you've indicated that you were familiar with this, did you not, Mr. DuPont? A. I said I've read it but it has been quite awhile back.

Q. And you name appears as one of the signators— A. Yes, sir.

Q. —to this, on page 6.

Now, were you present when the other individuals signed this? It might save a little time if you were. A. No, sir.

Q. But this purports to—this is a document entitled "Strike Call and Instructions Pertaining to Conduct of Strike". It bears at the top "System Federation No. 69". A. Yes, sir..

Q. Now, am I correct that System Federation No. 69 consists of these organizations? Do you want to
406 read it? (Tendering instrument to the witness) A. No, sir, that's it.

Q. Are those also referred to on occasion as shop crafts?
A. That's the shop crafts group, yes, sir.

Q. And they are the six unions listed here; IAM, Boilermakers, Sheetmetal workers, IBEW, Carmen, Brotherhood of Firemen, Oilers and Helpers.

Now, this was distributed, was it Mr. DuPont, by all of the members of System Federation 69? A. Yes, sir.

Q. And on page 3 of that, this provides that:
"No employes of the Florida East Coast Railway represented by our organizations will perform any service after the hour set to strike."
A. That's correct.

Q. And on page 4, it says; in part, the last sentence says:
"No employee will return to work until the strike is officially terminated."
A. That's correct.

Q. "Employes of classes or crafts other than the
407 crafts on strike are requested to refrain from crossing picket lines * * *".
A. That's right. You didn't finish reading that line.

Q. No, I didn't.
"except to the extent herein indicated."

Now, No. 9 says, in the last sentence:
"Every employe, member and non-member, is expected to obey the strike order which has been issued and any person remaining in the service after the strike is on will be designated as a strikebreaker."

A. Yes, sir.

Q. Is a strikebreaker considered a fairly unpopular person?

Mr. Milledge: Objection, Your Honor.

The Court: Objection sustained.

Mr. Milledge: That's obvious.

The Witness: You won't let me answer?

By Mr. Devaney:

408 Q. Now, the next paragraph refers to:

"Clearly defined cases of disloyalty or indifference on the part of any person involved in the strike * * *".

Now, is disloyalty and indifference, would that encompass the action of a person going to work for this employer against whom the authorized strike was in progress? A. I would say it definitely would be disloyal.

Q. Now, this paragraph says that:

"It is understood that similar instructions are being issued by the duly authorized representatives of the other cooperating organizations."

Then they are listed.

Now, you are listed here but there are others that are not included in System Federation 69? A. That's right.

Q. Now, when you say:

"It is understood that similar instructions are being issued"

do you know whether such instructions were in fact issued, similar to what we have gone over as distributed by System Federation 69? A. I can't swear to it that there

409 were or were not at this time.

Q. You don't recall having seen any copies of any such documents? A. I couldn't say at this time, no, sir. It has been too long ago.

Mr. Devaney: I also move that this, if we have not officially done so, be received in evidence as Defendant's Exhibit D.

Mr. Milledge: I believe, Your Honor, that Mr. Devaney's handwriting ought to be taken off the exhibit. It's kind of marked up.

The Court: Well, identify, if you will, Mr. Devaney, what markings you put on it and I'll just disregard those. Where is that?

Mr. Devaney: Mr. Devaney didn't put any of those markings on, Your Honor, but somebody did and I, if—

The Court: The underscoring is not a part of the document?

Mr. Devaney: The underscoring is not a part of
410 the original document.

The Court: I've been calling you Devãney through all these other cases: Do you call it Devâney?

Mr. Devaney: Yes, Your Honor.

The Court: Senator Butler one time called you "Devah-ney". Excuse me, I don't like to mispronounce anybody's name and I'll try to remember that.

Mr. Devaney: I have no further questions of the witness, Your Honor.

Mr. Shapiro: No questions, Your Honor.

Mr. Milledge: None.

The Court: Come down.

(Witness excused)

(Defendants' Identification Exhibit D was received and filed in evidence.)

Mr. Milledge: If it would help, we will stipulate
411 that the Constitutions of the other cooperating non-operating unions have similar provisions to the one just—the IBEW, and that their General Chairman would testify substantially the same as Mr. DuPont has just testified.

The Court: Well, this is perhaps—as you know, maybe you don't know this—entering a stipulation about any disciplinary action and about a similar notice to this Exhibit D—

Mr. Milledge: This last one? I suppose it went out to all the cooperating—

(Mr. Milledge conferring with witnesses)

The Court: If they were cooperating, I assume they cooperated by sending out the same notice to employees?

Mr. Milledge: It went to—five of them are apparently the authors of that, this D that you just had. Maybe it didn't go out to the other six. I say five of them in the System Federation, five or six.

The Court: Does that help you get on with your case?

412 Mr. Devaney: Well, I think with this, Your Honor, that we can speed it up. There are some about whom we do have some indication that disciplinary action was taken. We do have some indication that at least one other organization outside the shop crafts issued the same sort of instruction we've refererd to, but I believe that this stipulation may speed it up; and I will simply note for the record the provisions, as far as I'm familiar with them, without reading them or going into detail about them.

The Court: At least you don't need to call Carmen, Welders or some of the others in the System Federation?

Mr. Devaney: Well, one that has some disciplinary matters that we are vaguely aware of is the IAM, a member of the System Federation. So we can proceed with Mr. McDougall, if you care to, as the next individual.

The Court: All right, sir.

413 **R. W. McDougall,**

having been produced and first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Devaney:

Q. Mr. McDougall, you have heard the—

The Court: Let's get his name in.

Mr. Devaney: I'm sorry.

By Mr. Devaney:

Q. Would you state your name for the record, please, A. R. W. McDougall.

Q. Would you state your position with the IAM, please, A. President and General Chairman of District 16.

Q. Of the International Association of Machinists? A. A. International Association of Machinists, yes.

Q. Now, you have heard the statement made by Mr. Milledge. You do not disagree with that statement in any way, do you, that you have similar provisions to those which we have gone over in the IBEW contract relating to members who worked during the course of the strike?

A. Yes, they are similar.

414 Mr. Devaney: Now, in case anybody else does want to refer to it, may we mark this as E?

(Thereupon, the referenced material was marked Defendants' Identification Exhibit E.)

Mr. Devaney: This will be returned to you as soon as—at the close of the hearing.

The Court: Mark it the same as we marked A.

The Clerk: Yes, sir.

(Thereupon, Defendants' Identification Exhibit E was received and filed in evidence.)

By Mr. Devaney:

Q. I have noticed that the Sections that appear to be relevant in this connection include at least Article L, Section 3, on page 97. A. Section 3-

Q. Section 3. A. Improper conduct of a member.

The Court: Keep your voice up, please, Mr. McDougall.

The Witness: Yes, sir.

415 By Mr. Devaney:

Q. It's line 23 through 25. (Indicating) A. (Nodding head in the affirmative)

Q. That is one of the Sections we were referring to, isn't it? A. Yes.

Q. Now, Mr. McDougall, do you—are yau familiar with a case involving M. F. N. Neal? A. Yes, I am.

The Court: Neal?
Mr. Devaney: N-e-a-l.
The Court: Thank you.

By Mr. Devaney:

Q. Was Mr. Neal employed by the Florida East Coast? A. Yes, he was.

Q. And was he disciplined in any way by IBEW—I'm sorry, by the IAM? A. Yes, he certainly was.

Q. And in what manner? A. He was brought to trial under Article L of the Constitution and was sum-
416 marily found guilty and subjected to fine.

Q. Would the amount of that fine be a thousand dollars? A. Yes, it was.

Q. Do you have any of the records, the documents relating to this matter with you, Mr. McDougall? A. No, I do not. The Local Lodge transmitted the documents to the Grand Lodge in Washington, so they have the minutes of the trial and everything pertaining to it there.

The Court: What, there's an appeal pending?

The Witness: No, sir. Before the penalty can be levied, the Grand Lodge reviews every case.

The Court: They review it whether it's appealed or not; is that right?

The Witness: Yes, sir, that's right.

By Mr. Devaney:

Q. Now, in addition to that, was any further action taken by way of discipline against anyone who worked during the period of the strike? A. Yes. We had another case involving Mr. T. S. Sigmon.

417 Q. T. S. Sigmon? A. Sigmon, S-i-g-m-o-n.

Q. And was he disciplined in some way? A. Yes, he was disciplined in the identical way that Mr. Neal was and received the same penalty.

Q. And he also was a member who worked for F.E.C. during the strike? A. Yes.

Q. Now, what about a Mr. V. G. Swindull? I may not be pronouncing it correctly. I had his name as S-w-i-n-d-u-l-l. A. That's correct.

Q. Is that the one you just mentioned? A. No, sir. Mr. Swindull was a third party. However, at the time of the strike, he had withdrawn from active membership and held an honorary withdrawal card.

Q. I see. And was any action taken with respect to this withdrawal card? A. Yes, there was; as a matter of fact, it was revoked.

Q. And did that have the effect of terminating his membership in the union? A. Not to the extent that he could not make application and become an active member, no.

Q. You mean this would permit him—I mean, the fact that his withdrawal was terminated meant that he
418 could apply for membership over again? A. Yes, he could. He wasn't expelled from the union by that action.

Q. These people who were expelled, were they eligible to reapply? A. They were not expelled, Mr. Devaney.

The Court: They were fined.

The Witness: They were just fined.

By Mr. Devaney:

Q. Just fined the thousand dollars? A. Yes, sir.

Q. But Mr. Swindull, what did you mean that he was no longer affiliated? He had to make this application to be readmitted before he was a member again? A. That's correct. In withdrawing his honorary withdrawal card, it naturally made his membership in status quo more or less.

Q. Now, were there an other individuals with respect to whom the union took disciplinary action because of their working during the period of the strike? A. No, sir. As far as the IAM, just those three were involved.
419 Mr. Devaney: I don't know whether we moved—I now move that Defendants' Exhibit E be received in evidence, Your Honor.

The Court: I think I've already said that it could come in under the same terms as A came in.

Mr. Devaney: Yes, sir; fine.

The Court: To be returned to Mr. McDougall at the end of the hearing, but I want it available here for each side to read pertinent provisions in if they want to.

Mr. Devaney: I have no further questions of this witness, Your Honor.

Mr. Shapiro: No questions.

Mr. Milledge: No questions.

The Court: Come down, Mr. McDougall.

(Witness excused)

420 **W. F. Howard.**

having been produced and first duly sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

By Mr. Devaney:

Q. For the record, would you state your name, please. A. W. F. Howard.

Q. And are you an official of one of the labor organizations? A. I am.

Q. Which one, Mr. Howard? A. Brotherhood of Railway and Steamship Clerks.

Q. What is your position with that organization? A. General Chairman.

The Court: What is the Local involved? What is the designation of the Local?

The Witness: We have no—I'm the General Chairman of the System Board of Adjustment.

The Court: Of the System, the F.E.C. System?

The Witness: That's right.

421 The Court: In other words, you represent all clerks on the F.E.C. System?

The Witness: Right.

The Court: You don't call it a Local number; you call it F.E.C. System. Is that right?

The witness: F.E.C. System Board.

By Mr. Devaney:

Q. Now, these are the documents that I was furnished; being Constitution and By-Laws of the International Union and the By-Laws of the Florida East Coast System Board of Adjustment. A. I also gave you another copy of the By-Laws that were effective in May of 1963.

Q. Another copy of these? A. Yes. This was effective June 1st, 1959.

Q. Oh, I see. A. You will have to get the effective date from the inside.

Q. All right, let me get the other. A. There's another Constitution.

422 Q. Now, is this the one? (Indicating) A. That's the current one.

Q. That's the current one, and the other one was the earlier? A. Effective June 1, 1959 through June 30, 1963.

Q. Fine.

Mr. Devaney: Would you mark these, please?

The Clerk: You want them separately?

Mr. Devaney: I think you can mark these F, 1, 2 and 3.

The Clerk: All right.

(. . . Thereupon the referenced material was received and filed in evidence as Defendant's Exhibits F, F1 and F2.)

By Mr. Devaney:

Q. Now, are you familiar with this document, Mr. Howard? (Indicating) A. Yes, I am.

Mr. Devaney: Would you mark this then as G?

(. . . Thereupon, the referenced material was received and filed in evidence as Defendant's Exhibit G.)

423 By Mr. Devaney:

Q. Now, you heard the stipulation statement proposed, made by Mr. Milledge earlier.

Do you have any disagreement with that, Mr. Howard, that there are provisions in your various Constitutions and By-Laws similar to those that we discussed at some length with respect to the IBEW? A. Except to the extent that I think our Constitution and By-Laws do not call for an obligation.

Q. Now, to what are you—you mean what I referred to on the obligation of a member? A. Right.

Q. Now, I don't—to make certain that I understand you: You say that when a person becomes a member of the Clerks—Railway and Steamship Clerks, he doesn't take such an obligation of membership or that it's different than the IBEW? A. We haven't required an obligation since the effective date of the union shop agreement.

Q. And that was some time in '56? A. '53, I believe.

Q. '53. Now, under your Constitution, Mr. Howard, is an employee working for the Florida East Coast during the period of the strike anymore eligible for membership than the individual was applying for membership in the IBEW? A. Well, the eligibility for membership is spelled out in the Constitution, and that you have before you.

424

I think, along about page 78 of the former one, the former Constitution—

Q. Yes, I have it. This is the Section dealing with membership and Article 4, Section 1—now, this is the newest one, isn't it, newest agreement? A. No.

Q. That's not the one you had in mind? A. No. (Indicating)

Q. I see. You were referring to Article 2 of page 74 now? A. Right.

Q. Now, Section 2 of that, Mr. Howard, says that applications for membership, reinstatement to membership or reinstatement upon deposit of a withdrawal card, shall

be made in writing upon a form furnished for that purpose. The application must be signed and recommended by a member in good standing. A. That's correct.

Q. Now, Section 3(a) says:

"Members shall not propose for membership persons whom they do not know to be favorable to the
425 principles of the Brotherhood."

Now, I would take that to mean that, if a person were working during the period of an authorized strike against an employer, that the Clerks had called, that he would not be considered a person favorable to the principles of the Brotherhood? A. That's a prerogative of the Local Lodge. If you will read further there where they vote on them.

Q. I understand. But Section 2 says that an application must be signed by a member in good standing. And Section 3 says that members shall not propose for membership any person whom they do not know to be favorable to the principles of the Brotherhood.

Now, where in there does this—I mean, this seems like a flat limitation on—A. If someone proposes them, then he would be subject to that Section. (Indicating)

Q. I realize that, Mr. Howard. What I'm asking is that Section 2 says that the membership has to be signed by the applicant and recommended by a member. And Section 3 says that a member shall not propose for membership anyone whom they do not know to be favorable.

Now, a person wouldn't be favorable to the
426 principles of the Brotherhood if he were working for an employer against whom the Brotherhood was engaged in an authorized strike; isn't that correct? A. I would say that he wouldn't be favorable; but as to what a member might do in recommending him, that's entirely up to the individual Lodge, over which I have no jurisdiction in matters of this kind.

Q. Now, the Section to which you referred was Section 4, which then provides that all applications for member-

ship, reinstatements to membership, or reinstatement upon deposit of withdrawal card, shall be ballotted on at the meeting at which the application is reported, unless challenged by a member in good standing.

If the applicant is challenged, this could be any member of the Local Union, could it not? A. Yes.

Q. If any applicant is challenged, the President will appoint an investigating committee of three who shall report not later than the next regular meeting.

Mr. Milledge: Excuse me. I think this intellectual debate about the terms of this Constitution can go on quite a long time. We've already stipulated that these all are essentially the same.

427 The Court: I'm inclined to agree.

Mr. Devaney: Your Honor, I have not wanted—

The Court: It speaks for itself. I suppose that Mr. Howard is entitled to be called on to some extent to construe it, but I think we can construe it also.

By Mr. Devaney:

Q. Now, are you familiar with the disciplinary action taken by any member of the Clerks who has worked for Florida East Coast during the period of the strike, Mr. Howard? A. Yes. I have a report on one incident.

Q. And what is that one? A. That was an incident involving Miss Anna M. Wright, I believe her name is, in Miami.

Q. Do you have those records with you? A. Yes, I do have them.

Q. Would you mind getting them, please. A. (Witness left the witness stand, obtained instrument, tendered same to Mr. Devaney, and resumed the witness stand.)

Mr. Devaney: While Mr. Shapiro is looking at

428 those, may I just note for the record that at least some of the other provisions of the Constitution that are similar to those of the IBEW are Article 2, Section 4, appearing at page 111; Section 3(a), at page 79; Section

3(b), on page 79—correction on that. The Sections that I just mentioned are those in the earlier version, which are marked for identification as Defendants' Exhibit F1. Those page numbers would be different in the basic document marked as Defendants' Exhibit F.

By Mr. Devaney:

Q. The similar provisions are in both, are they not? A. Practically the same.

Mr. Devaney: Again, would you mark this, please?

The Clerk: H.

(. . . Thereupon, the referenced material was received and filed in evidence as Defendants' Exhibit H.)

By Mr. Devaney:

Q. Does this constitute the complete file on this individual? You say the name was Wright, Anna? A. Do I say that? Anna M. Wright; right, that constitutes all that was—

429 Q. —given to you? A. Given to me. Whether the Local Lodge has any additional or not, I do not know.

Q. Now, in the—I note that the minutes of the meeting, Mr. Howard, say, in part, that:

"I, E. W. Pollard, being a member in good standing in Flamingo Lodge No. 751, charge that Miss Anna M. Wright, a member of Flamingo Lodge No. 751, violated Article 2, Section 4, of the Protective Laws of our Brotherhood, as set forth and in the stipulated manner as follows:

"On or about June 10, 1963, Miss Anna M. Wright did accept and perform work for the strikebound Florida East Coast Railway and did bid on and was assigned to position of stenographer-clerk in the office of the Assistant Freight Traffic Manager, Miami, Florida, as per Bulletin 1963-4, dated June 18, 1963, and signed by F. P. Oldfather, A.F. T.M.

"I make this charge in compliance with Article 10, Section 2 * *".

430 And it goes on to say:

"As it is clearly evident that defendant Anna M. Wright either refuses or neglects to stand trial * * it is our duty to find said defendant in contempt, which report shall be conclusive and punishment expulsion."

And it is signed by the Chairman, Mr. Cooper; another name that I can't read, Susanna something.

The Witness: Maschue, M-a-s-c-h-u-e.

Q. Secretary, and McKinnon, Recorded. Right.

Q. And you have two witnesses, Committeemen? A. Right. That's R. W. Hayes and Leo Pasuik.

The Court: A little louder, please.

By Mr. Devaney:

Q. R. W. Hayes and Leo Pasuik? A. Yes.

Q. Now, even though the ultimate decision was explusion for failure to attend the hearing on the charges, is it correct, Mr. Howard, that the basic violation was the fact that she had bid on a job during the period of the

431 strike? A. The correspondence would indicate that. I did not personally handle the matter.

Q. I see. Now, this was all of the documentation you were given on this matter? A. Right.

Q. You have no other document? A. I have no other document.

Q. Are you familiar at all with Mr. Joseph M. Grimsley? A. No, I'm not.

Q. Are you familiar with a Jessica Sparks? A. I don't know them personally.

Q. Do you know of any—

The Court: Do you know anything about their cases?

The Witness: No, I know nothing about cases involving either one of them. If any action has been taken against them, it hasn't been reported to me.

By Mr. Devaney:

Q. Now, are you familiar with anyone who has applied for membership in the Clerks Union and has been denied that membership, Mr. Howard? A. I have no knowledge of it.

Q. And none of this has ever come to your at-
432 tention? A. No, it hasn't.

Q. You simply do not know whether Jessica Sparks applied for membership and tendered dues and was rejected as a member, do you? A. No, I have no information on it but, according to my recollection, she was a member.

Q. She was a member? A. Yes.

Q. Is she now a member? A. I don't know.

Q. Does it refresh your recollection to recall that she also accepted a job later with the State of Florida? A. No, I have nothing on that.

Q. Do you recall any action taken against any member of the Clerks Union who accepted employment in some place other than Florida East Coast while the strike was in progress? A. No, I do not.

Q. Does the Clerks have a policy against members accepting such employment during the period of the strike? A. At other points in other industries?

Q. Yes. A. No, we have no policy.

Q. Now, I don't—perhaps you could find it faster
433 than I. (Tendering instrument to the witness) The earlier copy, this appears at page 117—it used to be Article 2, Section 14, page 117; I'm not sure where it appears now. Here is where—see if it appears to be the same Section 14? A. (Witness indicating on instrument to Mr. Devaney)

Q. Now, isn't this, Mr. Howard, a Section that deals with the limitations on the right of striking employees to obtain employment elsewhere? A. No, it isn't a restriction or a limitation. That Section is there solely for the

purpose of determining who is entitled to strike benefits.

Q. Well, what does that say? A. That striking employees securing employment elsewhere during the period of such strike or lockout shall be excluded from all strike benefits and must obtain permission—

The Court: Excluded from what?

The Witness: From all strike benefits.

By Mr. Devaney:

Q. All right. A.—must obtain permission from the Strike Committee before accepting any other employment.

Q. That's what I had in mind. Must obtain per-
434 mission before accepting any other employment? A. That's—

Q. That's more than just strike benefits? A. No. That's in order for us to know that he is not entitled to strike benefits after he secures employment elsewhere.

Q. Now, you still have no recollection of Anna M. Wright, of action being taken against her because she first came to work for F.E.C. during the strike and later took a job with the State of Florida. You don't recall that? A. You said Anna Wright?

Q. I'm sorry. Sparks; Jessica Sparks? A. No, I have no report on it.

Q. What is your—you are General Chairman, Mr. Howard? A. Right.

Q. Now, I note from this, apparently Mrs. Sparks—that this involved the St. Augustine Local. Is Mr.—are any of the officials of that Local here today? A. No, they are not.

Q. Now, one further thing, Mr. Howard:

On Anna Wright—she was—what happened to her? She was expelled? A. Yes, she was expelled.

435 Q. Now, is a person who is expelled barred from applying for membership again? A. No.

Q. Readmission? A. No.

Q. Isn't it true that Anna Wright did apply for readmission? A. I would have no knowledge of an application being made for membership in any Lodge until they had been accepted and reported to me as having become a member of a certain Lodge. I only get reports on additions to membership. I don't have any record of those who may make application.

Q. Would you recognize this, Mr. Howard, from—it's in the handwritting of Mr. Cooper. Do you know his handwriting? A. Yes. I would say that is his writing.

Q. You have no question that that is on authentic letter? A. No, there's no doubt in my mind but that was written by Mr. Cooper.

(Mr. Devaney handing instrument to Mr. Shapiro)

Mr. Shapiro: Your Honor, I think I'm going to
436 object to this exhibit on the ground that it's a letter written by somebody else, and being identified simply on the basis of a third party's recollection of how handwriting looks.

The Court: I'm satisfied of its authenticity by what Mr. Howard says. It's received.

(The referenced document was received and filed in evidence as Defendants' Exhibit I.)

By Mr. Devaney:

Q. That letter, signed by Mr. Cooper, indicates that she had applied for readmission and had been voted on and rejected; isn't that correct, a correct summation of it? A. That's correct.

Q. I show you again this which has been marked as Defendants' Exhibit G, which you have indicated you were familiar with? A. Right.

Q. Now, that is—I haven't compared it; if it is not identical, it is certainly very substantially similar to Defendants' D; is it not, Mr. Howard? Here it is. (Handing

document to witness) They both—A. They seem to be the same.

Q. They seem to be very, if not identical, certainly
437 very similar? A. Certainly very similar.

Q. Now, you heard Mr. DuPont. We reviewed some of the various provisions of D. Did you hear his testimony? A. I did.

Q. The same provisions appear in G; do they not? A. Yes.

Q. Now, you also state, as D did, that:

"It is understood that similar instructions are being issued by the duly authorized representatives of the other cooperating organizations."

Then all the cooperating organizations are listed.

Do you know whether any of the cooperating organizations, other than the shop crafts and System Federation 69, issued similar instructions? A. I have not seen them.

Mr. Devaney: I have no further questions, Your Honor.

The Witness: I would like to ask that the file of the Anna Wright case, the original file, be returned to me.

Mr. Devaney: Mr. Howard, as we indicated with
438 the others, we will have that copied and it will be returned to you as soon as we have copies made.

The Court: I think as to all of them, you plan to put a copy in this file, don't you?

Mr. Devaney: The only thing that we do not plan to put copies of in are the Constitutions.

The Court: That's the only purpose for furnishing the copies, as far as I'm concerned, is to be made an exhibit here.

Mr. Devaney: That's right, Your Honor.

The Court: You may as well make yourself a copy of it while you have it.

Mr. Devaney: Oh, yes.

The Court: All right.

Mr. Devaney: But the thing we had not planned to make copies of were the Constitutions.

439 The Court: I understand. That's correct. But these—

Mr. Devaney: All of the other documents—

The Court: —these disciplinary files that the various Chairmen—

Mr. Devaney: Quite correct, Your Honor; all those will be copied and the file will be put in here, the originals returned to the owners and the other parties will have a copy.

The Witness: You may retain those Constitutions that I brought.

Mr. Devaney: Fine. Thank you very much.

The Court: You have plenty of yours?

The Witness: I have plenty.

The Court: Thank you very much.

Mr. Shapiro?

Mr. Shapiro: No questions.

440 Mr. Milledge: You can come down.

The Court: All right, come down.

(Witness excused)

Mr. Devaney: Mr. R. G. Smith.

R. G. Smith.

having been produced and first duly sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

By Mr. Devaney:

Q. For the record, would you state you name, please. A. R. G. Smith.

Q. And what is your position with the union? A. I am General Vice President of the Brotherhood of Railway Carmen and also employee of the Florida East Coast Railway.

Mr. Shapiro: Your Honor, I wonder whether we could ascertain whether the same general line of questioning is

to be developed through Mr. Smith that's already been developed? If so, I would suggest that, if it's going to be cumulative, Mr. Devaney has now established
441 facts which will be sufficient to support the defense he wishes to make respecting the union shop aspect of his case, if Your Honor should rule that that defense is a valid one.

The Court: Well, I think Mr. Devaney has my request not to duplicate in mind. I think he has in mind the stipulation that Mr. Allan Milledge suggested a few minutes earlier; just so far as is necessary to fill out the picture as you want to paint it.

Mr. Devaney: That's correct, Your Honor.

The Court: All right.

By Mr. Devaney:

Q. Now, Mr. Smith, you heard the stipulation that Mr. Milledge proposed and you heard the testimony of Mr. DuPont; isn't that correct? A. Yes.

Q. And Mr. Milledge has stated that all of the cooperating unions have similar provisions. You do not disagree with that, do you? A. No, but I wouldn't know about all of them. However, I would assume—

442 Q. I'm talking about just yours, just yours, Mr. Smith. A. Yes, ours does.

Q. Has similar provisions? A. Yes.

Q. Now, have there—in fact, you may check me on these if you like: I notice that at least Section 31 on page 23 and Section 77 on page 76 appear to be two of the provisions that are similar to those we discussed. (Indicating to witness) Now—A. I don't know whether it would be helpful to you or not, but this Constitution, there are two Constitutions involved.

Q. Oh, I see. A. There is one that became effective January 1 of this year. They are similar, though. I don't believe there are any—

Q. And this one is out of date? A. Yes, this one is out of date.

Q. I thought—perhaps I have another one and wasn't aware of it.

The Court: He says they are similar.

443 Mr. Devaney: All right, sir.

The Court: These provisions haven't been changed, I suppose, in years?

The Witness: Your Honor, I don't believe they have. I wouldn't say for sure but I don't believe they have been changed.

The Court: All right. Actually, the out-of-date one was the one that was in effect, I suppose, at the time the strike occurred?

The Witness: That's right.

Mr. Devaney: So far as I know—

The Court: Rather than the one effective January of this year?

Mr. Devaney: That's right. This was the one furnished, Your Honor. We don't seem to have another one.

The Witness: Well, I—

Mr. Devaney: I mean, we are not—

444 The Witness: Our General Chairman, Mr. Cooke, furnished this one and maybe—let's see, the new Constitution went into effect the 1st of January and it took some time to get them printed. Maybe he just hasn't—I have one I'll be glad to lend you.

Mr. Devaney: This is fine, if the provisions are similar.

The Witness: I just don't think there are any material changes in them.

Mr. Devaney: Fine.

By Mr. Devaney:

Q. Now, have there been any disciplinary actions, to your knowledge, Mr. Smith, with respect to any member of the Carmen's Union who has worked for Florida East

Coast during the period of the strike? A. None whatsoever. I understand we have some members that are working, paying dues.

Q. That are working? A. Yes, paying dues.

Q. Have any new members been admitted; that is,
445 employees who have—A. We have six separate Lodges. While I was on this property for some 25 years as General Chairman, we negotiated most of the agreements in the System Federation 69. I haven't had much to do with it locally in four or five years now, but we have six separate Lodges; but insofar as I know, no application has been made. I don't believe there has.

Q. All right. Now, you say there have been no disciplinary actions so far as the—A. I'm reasonably sure of that because I was—I fought against it.

Q. Would that come to you if there were disciplinary action? A. I believe it would.

Q. Yes, sir. A. It wouldn't necessarily have to. I think I would know about it, but I would object to it.

The Court: What are you marking?

The Clerk: Defendants' J. The Constitution will be J and the By-Laws K.

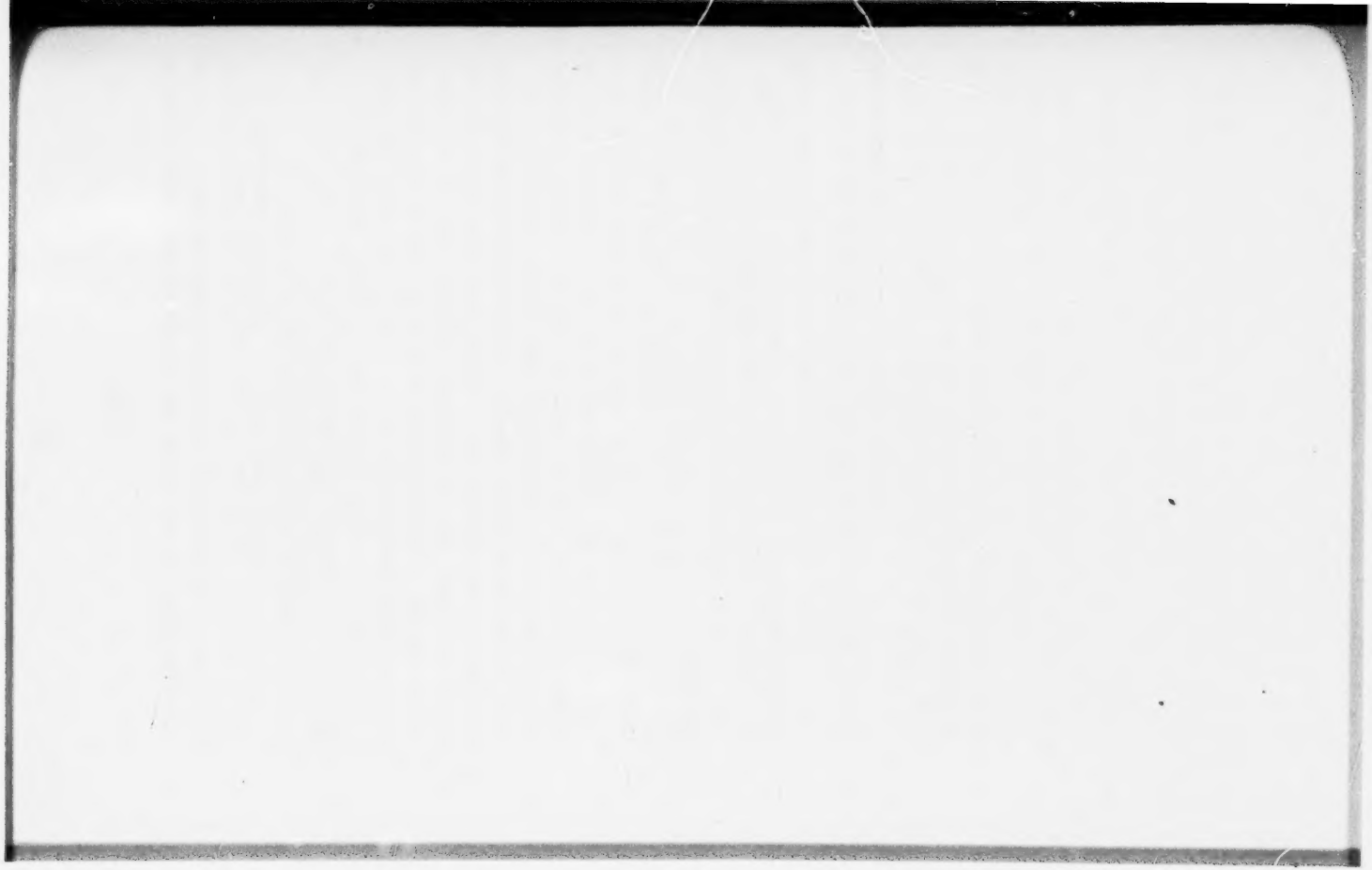
(The referenced material was recieved and filed in evidence as Defendants' Exhibits J and K.)

446 Mr. Devaney: I have no further—oh—well, perhaps I'd better ask Mr. Cooke, since these belong to him. I have no further questions of this witness, Your Honor.

Mr. Shapiro: No questions, Your Honor.

The Court: Come down, Mr. Smith.

(Witness excused)



VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. 750

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, ET AL., PETITIONERS,

vs.

FLORIDA EAST COAST RAILWAY COMPANY.

No. 782

UNITED STATES, PETITIONER,

vs.

FLORIDA EAST COAST RAILWAY COMPANY, ET AL.

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, PETITIONER,

vs.

UNITED STATES.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 750 PETITION FOR CERTIORARI FILED NOVEMBER 18, 1965
NO. 782 PETITION FOR CERTIORARI FILED NOVEMBER 29, 1965
NO. 783 PETITION FOR CERTIORARI FILED NOVEMBER 29, 1965
CERTIORARI GRANTED JANUARY 24, 1966



IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22,134

FLORIDA EAST COAST RAILWAY COMPANY, *Appellant-Appellee*

v.

UNITED STATES OF AMERICA, *Appellee-Appellant*

(And Reverse Title)

Appeals from the United States District Court for the Middle District of Florida

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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(And Reverse Title)

Appeals from the United States District Court for the Middle District of Florida

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APPENDIX

Mr. Devaney: Mr. Cooke.

R. M. Cooke,

having been produced and first duly sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

By Mr. Devaney:

Q. Will you state for the record your name, please. A. R. M. Cooke.

Q. And you are an official with the Carmen's Union? A. I'm General Chairman, yes, sir.

Q. And these documents that have been marked as Defendants' J and K, those were furnished by you, were they? A. Yes, sir.

Q. Now, have there been any disciplinary actions taken by the Carmen's Union that you are aware of, Mr.
447 Cooke? A. None that have been called to my attention, no, sir.

Q. Now, are these copies extra copies or do you wish them returned to you—the Constitution and the By-Laws? A. I would like to have them returned, yes, sir. They are my office copies.

Q. Mr. Cooke, I hand you this and ask if you are familiar with that letter? A. Yes, sir. This is a letter that I wrote, a copy of it.

Q. A copy of it? A. Yes, sir.

(Mr. Devaney tendering instrument to Mr. Milledge)

Mr. Devaney: Mark that as L, please.

(Thereupon, the referenced document was received and filed in evidence as Defendants' Exhibit L.)

By Mr. Devaney:

Q. Now, this document which has been marked as Defendants' L, Mr. Cooke, is a letter addressed to Mr. Wyckoff. It is dated February 8, and the last paragraph says:

"Please be advised that the employes that I represent have withdrawn from the service of the Florida East
448 Coast Railway Company on a legal strike and that such employes are not subject to call for service."

Now, what was intended by that last sentence of not being subject to call for service? A. Well, simply that several of my members were complaining that the local supervision had called them by telephone and requested that they return to service, and had even intimated in a couple instances that the seniority of the individual would be terminated if they didn't return to service.

Q. Did you later receive a letter from Mr. Wyckoff on this point? A. Yes, sir. I recall that I did.

Q. Is this a copy of the letter that he sent you? (Indicating) A. Yes, sir, I believe that's the letter.

Q. Now, once—I mean, he made it very plain, did he not, in this letter that these people were not being forced to—A. Yes, sir, he did.

Q. —come back to work? A. Yes, sir.

449 Mr. Devaney: I haven't had this one marked.

(Tendering to Mr. Sharpiro)

Mr. Milledge: We all agree putting that in as part of the same exhibit, if that's all right.

Mr. Devaney: Just attach it as a second page to L.

The Court: To L?

Mr. Devaney: L.

By Mr. Devaney:

Q. Do you—is this the only position you hold, Mr. Cooke? In the Union? A. No, sir. I'm also President of System Federation No. 69.

Q. And as I recall, that is the organization of the six shop crafts? A. That's correct, yes, sir.

Q. But this letter, just for the record now, of February 8, you signed as General Chairman of the Brotherhood of Railway Carmen. You weren't signing this as System

Federation 69? A. That's correct. I signed it as General Chairman.

450 Q. Do you know whether the other members of the System Federation 69 signed a similar or identical letter to your letter of February 8? A. I could not say for sure; I think that some of them did but I am not sure of that.

Q. Was there any official direction by you, as President of System Federation 69, that such a letter be sent? A. No, sir, not from me; no, sir.

Q. Was there any action or consideration by System Federation 69 of the advertising for bids on jobs by the Florida East Coast? A. None, that I can recall; no, sir.

Mr. Devaney: No further questions, Your Honor.

Mr. Shapiro: No questions, Your Honor.

The Court: Suppose we break off for a few minutes here.

Mr. Devaney: Very good.

(Witness excused)

The Court: Maybe you can use this time to see where you stand.

(Short recess)

451 **R. M. Cooke**

was recalled to the stand and further testified as follows:

Further Direct Examination:

The Court: I thought we were through with Mr. Cooke.

Mr. Devaney: I neglected to ask him one question.

The Court: All right, sir. Go ahead.

By Mr. Devaney:

Q. Mr. Cooke, was John Katsikos a member of your union? A. Yes, sir.

Q. And was he a local officer of the union? A. Recording Secretary, I believe; yes, sir.

Q. And this was the Miami Lodge? A. Lodge 555, Miami.

Q. And was Mr. Katsikos one of the individuals indicted—

Mr. Milledge: Objection. I move the question be striken.

The Court: One of the individuals, what?

452 Mr. Devaney: Indicted for bombing or attempted bombing of an F.E.C. bridge or train?

Mr. Milledge: I object to the question and move the question be striken from the record.

The Court: What is the purpose of this?

Mr. Devaney: Well, as we said this morning, Your Honor, I think that there is a relationship here between the sabotage that has occurred on the railroad and the strike itself.

Now, the Government has premised this action on the theory, or has premised its argument on the theory that the Florida East Coast has greatly benefitted from certain rules that have been placed into effect.

The Florida East Coast has been subjected to very serious loss of property and of life by these threatened acts of sabotage. And I merely—

Mr. Milledge: Life?

Mr. Devaney: —asked whether—threatened loss

453 loss of life; no life, fortunately, has been lost and no serious injuries have occurred as a result of these bombings. But the fact that you blow up a train while in movement is a very grave threat and one—

The Court: The fact that you have been indicted doesn't prove you did it either.

Mr. Devaney: No, I agree, Your Honor. I quite agree.

The Court: And if Mr. Katsikos did it, I don't see how this plaintiff in intervention, this Carmen's Union, is responsible for everything that Mr. Katsikos or any other union member does.

Mr. Devaney: No, that's quite correct, Your Honor.

The Court: I just don't see the relevancy of this. I'm

going to strike the question. I'll let him put his answer in. I assume that he is—that the answer will be yes; is that right?

The Witness: Yes, sir, he is.

454 The Court: All right. The question and answer are striken. You have them in the record as a proffer.

Mr. Devaney: Very fine.

No further questions.

(Witness excused)

Mr. Devaney: At this time, Mr. C. J. Robbins.

C. J. Robbins,

having been produced and first duly sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

By Mr. Devaney:

Q. Would you state your name, please. A. Charles J. Robbins.

Q. And are you an official with one of the labor organizations? A. General Chairman of the American Train Dispatchers Association.

Q. And you were served with a subpoena duces tecum, were you not? Including the item, the Constitution and the By-Laws of your organization? A. That's right, sir.

Q. Now, that is one of the—do you have that
455 with you now? A. No. I brought it in.

Mr. Devaney: This is one that I had not received, Your Honor. I wonder—

Mr. Milledge: I think we had it. I thought we had given it to you.

By Mr. Devaney:

Q. While Mr. Milledge is looking, you are also not one of the so-called eleven cooperating non-operating organiza-

tions, are you? A. That's right. The American Train Dispatchers are not on strike.

Q. Have you been working since January 23rd, 1963? A. No, sir. We have been honoring the picket line.

The Court: Keep your voice up please, Mr. Robbins, and speak a little louder and more distinctly.

Mr. Milledge: He can probably tell us about the provisions.

By Mr. Devaney:

Q. Were you here, Mr. Robbins, when Mr. DuPont testified at some length with regard to the various pro-
456 visions of the IBEW Constitution? A. Yes, sir, I was.

Q. And you are familiar with the stipulation that Mr. Milledge proposed for the eleven cooperating unions.

Now, you not being one of those, that stipulation binds you in no way, but does your Constitution have similar provision with respect to members working during the period of the strike? A. Probably. I have an older copy in my files over here, if you would like to look at that one. I have it.

Q. Fine. A. (Witness leaving stand, obtaining instrument and returning to stand)

Mr. Milledge: Here it is, Mr. Robbins. I did locate it.

(Handing instrument to Mr. Devaney:)

Mr. Devaney: Would you mark this one also?

The Clerk: Defendants' M.

(The referenced document was received and filed in evidence as Defendants' Exhibit M.)

By Mr. Devaney:

Q. Now, you say that there only probably similar
457 provisions; or are you reasonably certain, or do you wish to look at it? Do you wish to look at it and make certain? A. I would like to look at it and make certain.

Q. All right. A. Now, the question? Would you read the question, please?

Q. The question—you can read it—what I had asked earlier was whether, after having heard the testimony of Mr. DuPont in which he reviewed various provisions of the IBEW Constitution which related to the penalty against a member who worked for an employer during the course of an authorized strike, and then we examined the various provisions of membership and obligation of membership, et cetera, and I asked if—and Mr. Milledge stated on behalf of the eleven cooperating unions that they had similar provisions to those contained in the IBEW agreement.

Now, what I asked you is whether you had stated that you probably had such similar provisions. Then I asked—A. I now say that they do have such similar provisions.

Q. That they do have? A. Yes.

Q. All right, fine.

Mr. Milledge: I just would like to point out that
458 this probably is not relevant, even along this line, because the Train Dispatchers aren't on strike. I don't believe they ever have been during this dispute; have they, Mr. Robbins?

The Witness: We have not been on strike, no, sir.

By Mr. Devaney:

Q. Now, Mr. Robbins, if I recall the testimony yesterday, it was stated that the American Train Dispatchers had bargained with the company concerning the company's notice of July 31st of the intention to terminate the union shop agreement; is that correct? A. He had bargained, yes, sir.

Q. Did this bargaining occur in the presence of a Court Reporter? A. Yes, sir, it did.

Q. Did you by chance order copies of the transcript? A. I did, sir.

Q. Now, the cancellation—

The Court: Was the answer that you did order copies?

The Witness: Yes, I did.

459 The Court: Thank you.

By Mr. Devaney:

Q. Now, the cancellation of the union—of your union shop agreement has never been placed into effect as to your union; is that correct? A. That's the way I understand it, yes, sir.

Q. Now, during the period of the strike, Mr. Robbins, have members of your union returned to work, to your knowledge? A. One of our members has returned to work.

Q. Has any disciplinary action been taken against him? A. None whatever.

Q. Have any new members been admitted, that is, new employees—A. No, sir.

Q. —hired since the strike began? A. No, sir.

Q. Now, Mr. Robbins, I show you this document which is marked as Defense Exhibit G, which is the "Strike Call and Instructions Pertaining to Conduct of Strike". Did you receive a copy of that or one similar to that issued by either the cooperating unions or any other union at or before the strike began on January 23? A. No, sir.

460 I don't recall ever having received a copy of that.

Q. Were you requested by one or more of the unions involved in this strike not to work during the period of the strike? A. No, sir.

Q. Were you informed in advance that the strike was going to begin? A. Yes, I had been informed.

Q. You were informed by the unions? A. I had had word by the unions, or a summons, and I also got word from the railroad that, as of such-and-such a day, our jobs were abolished.

Q. This was conditional on the strike occurring, wasn't it, Mr. Robbins? A. That's right, sir.

Mr. Devaney: Your Honor, subject to looking at the document marked as Defendants' M, which I have not seen until it was handed to me here this afternoon, I have no further questions of this witness at this time.

Cross Examination

By Mr. Milledge:

Q. Mr. Robbins, you've got how many members in Florida? A. A total of five.

461 Q. A total of 5. So 20% of your people have gone back to work? A. That's right.

Mr. Milledge: That's all we have.

(Witness excused)

Mr. Devaney: Mr. C. S. Kerr.

The Court: Sir?

Mr. Devaney: Mr. C. S. Kerr.

C. S. Kerr,

having been produced and first duly sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

By Mr. Devaney:

Q. For the record, Mr. Kerr, would you state your name? A. Charles S. Kerr.

Q. Are you an official of the American Railway Supervisors Association? A. Yes. I am the District Chairman.

462 Q. Now, you received a subpoena to bring with you your Constitution and/or By-Laws? A. Well, I didn't have it here. There might be one over there in that pile.

Q. Then you have brought them? A. I didn't have anything to bring. I didn't have any records or nothing. I was put on as District Chairman and came at the same time as the strike, so I've never been involved in anything, period.

Q. So you don't have a copy of your Constitution? A. No, sir.

Q. You have been here, have you not, Mr. Kerr, during the period Mr. DuPont and others have testified about the obligation of employees and so forth? A. Yes, sir.

Q. To the best of your knowledge, is this the same obligation of membership that these other unions have, that is, not to work during—for an employer during the period of an authorized strike? A. No, sir, I don't think so, because we have some supervisors that are working that are members of the organization and paying their dues.

Q. Had you taken any disciplinary action against any of those people, Mr. Kerr? A. Not to my knowledge.

463 Q. Have you expelled any of them? A. Not to my knowledge.

Q. Have you admitted any new employees to membership? A. I don't know of any that even put in application. That would be handled by our General Chairman.

Q. By your General Chairman? A. Yes.

Q. Where is he located? A. C. W. Puckett. He's in Miami.

Q. Miami? A. Yes.

Mr. Devaney: No further questions of this witness.

Cross Examination

By Mr. Milledge:

Q. Are the Supervisors on strike? A. No, sir.

Q. You haven't been on strike? A. No, I never have been on strike. I was just cut off.

Q. And some of your men are back to work? A. Yes, sir.

The Court: You said you were cut off?

464 The Witness: Well, I received a notice from the company that, when the railroad went on strike, I didn't have no job no more.

The Court: Yes, sir.

Mr. Devaney: Mr. Kerr, just before you leave now—

The Court: Come back.

Redirect Examination

By Mr. Devaney:

Q. Isn't it true that you received notices of jobs advertised for bids since February 3rd? A. No, sir; absolutely not.

Q. Are you saying that you would have accepted employment but was never—

The Court: He hasn't said that.

The Witness: I didn't say that. Now, I just answered your question.

By Mr. Devaney:

Q. Well, have you been informed of any jobs
465 within your classification that have been posted for bids? A. No, sir.

Q. Have you made any effort to see whether bids were posted? A. No, that's up to them. They furloughed me. It's up to them to write me a letter whenever they have one that's open, if my seniority would entitle me to the job.

Q. Now, you say that the proecdure in advertising bids requires that the individual furloughed must be— A. Absolutely.

Q. —advised by letter? A. How is he going to know otherwise?

Q. Have you been advised by—you say you have never been advised by letter of the availability of work since the strike began? A. No.

Q. You are positive of that? A. I am positive.

Mr. Devaney: No further questions, Your Honor.

The Court: Anything further?

Mr. Shapiro: No, sir.

(Witness excused)

466 Mr. Devaney: Mr. Winstead.

Charles L. Winstead.

having been produced and first duly sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

By Mr. Devaney:

Q. For the record, would you state your name, Mr. Winstead. A. Charles L. Winstead.

Q. And are you an official of the Brotherhood of Maintenance of Way Employees? A. Beg pardon?

Q. Are you an official of the Brotherhood of Maintenance of Way Employees? A. I am General Chairman of the Brotherhood of Maintenance of Way Employees, Seaboard Federation.

Q. Now, does that include the Florida East Coast? A. It does, yes, sir.

Mr. Devaney: Now, I would like to have marked this—this is the Constitution you furnished, isn't it?

The Witness: Yes, sir.

467 The Clerk: N.

(The referenced document was received and filed in evidence as Defendants' Exhibit N.)

By Mr. Devaney:

Q. Now, you have heard the stipulation proposed by Mr. Milledge to the effect that the Brotherhood of Maintenance of Way Employees has similar provisions in its Constitution to those reviewed by Mr. DuPont with respect to the IBEW Constitution.

Is there any deviation from that? A. I don't know whether I'm correct in this or not. I think you read in his Constitution something about an obligation that they take them.

Q. Yes. A. I don't think there's any obligation in our Constitution and By-Laws, Mr. Devaney.

The Court: When a man enters a lodge, doesn't he take some kind of an oath?

The Witness: Sir?

The Court: Doesn't a man take some kind of an
468 oath when he enters a lodge?

The Witness: Not to my knowledge, no, sir. It might be a local lodge matter, Your Honor.

The Court: I see. Thank you.

By Mr. Devaney:

Q. Now, except for the obligation of membership, Mr. Winstead, do the other deviations we talked about, that is, the subjection of the member to expulsion if he works for an employer against whom there is an authorized strike— A. I would say that's—

Q. —those provisions do apply I mean, you have similar provisions in your Constitution? A. I would say so, yes.

Q. Now, have there been any members of your organization against whom disciplinary action has been taken since January 23, 1963, and in connection with, who were former employees of the Florida East Coast? A. Not to my knowledge, no, sir.

Q. Now—

The Court: Would you be likely to know?

469 The Witness: Sir?

The Court: Would you be likely to know?

The Witness: Well, I think the Constitution and By-Laws would provide, Your Honor, that just action taken against a member would have to be by a member in the Local Lodge; and I don't have—

The Court: Would it be reported to you as General Chairman?

The Witness: I would think so, yes, sir.

Mr. Devaney: Now, one of the provisions, Your Honor, purely for the record, similar to those that we referred to earlier, is Article 21, Section 21, appearing on—the portion appearing on page 107, in particular; Section 7, on page 65; Section 8, on page 66; Section 2, on page 61.

By Mr. Devaney:

Q. Do you care to look at any of those? I didn't mean to—(Tendering to witness) A. You read them off so fast there.

Q. If I have made any errors since 61— A. You
470 are talking about Section 2 here? (Indicating)

Q. Yes. A. What is your question about it?

Q. I didn't ask anything. I just said that these were similar provisions, were similar to those Mr. DuPont had pointed out and discussed. A. Yes, sir. I would assume that, yes, sir.

Mr. Devaney: I have no further questions of this witness, Your Honor.

Mr. Shapiro: No questions.

The Court: Mr. Winstead, your craft is one of the non-operating unions which is on strike, what's called the eleven non-operating cooperating—

The Witness: Yes, sir, Your Honor.

The Court: —crafts. So that you have been on strike since January 23, 1963?

The Witness: Yes, Your Honor.

471 The Court: Thank you.

By Mr. Devaney:

Q. Mr. Winstead, before you go, I find that you have given us a second document which is entitled "By-Laws of the Joint—" A. That's the System Federation By-Laws, Mr. Devaney.

Q. Well, it's entitled "For the Government of the Joint Protective Board and Members of Seaboard Federation". A. Yes, sir, that's correct.

Q. This is Seaboard, Jacksonville Terminal, Florida East Coast, Broward County Port Authority, Gainesville Midland Railroad and Norfolk Southern Railway. A. Correct.

The Clerk: O in evidence.

(The referenced document was received and filed in evidence as Defendant's Exhibit O.)

By Mr. Devaney:

Q. Now, turning your attention to that, Mr. Winstead, No. 7 provides as a preamble the objects of the Seaboard Federation are: No. 7, to require all members to faithfully and honestly perform their duties to the best of their ability for the Brotherhood and for their employers. And I guess that—perform to the best of their ability for the
472 Brotherhood, their duties.

We asked Mr. DuPont, does that include the duty to honor any authorized strike call?

That's your Local By-Laws now. A. Well, there's nothing referred to in there, Mr. Devaney.

Q. I agree there isn't. This is a general term. But is one of the duties—is one of the duties to the Brotherhood an obligation or, as I say, you say you don't have an obligation; that is, it is expected that the members will obey any lawful action, including the authorization of the strike? A. Well, sir, there's nothing supposed to be in that Constitution and By-Laws that conflicts with the Grand Lodge Constitution and By-Laws.

Does that answer your question?

Q. Yes. We have established that nothing—that the Grand Lodge Constitution has such a provision. A. Well, there's not supposed to be anything in there to conflict with that.

Q. I understand. But this was the only one that I saw here that seemed to bear on this question. And I ask you, does it, even though it's general, does this have the same effect by imposing this duty on membership to abide
473 by the rules of the union? A. Well, in my opinion, I would say yes.

Q. Fine.

Mr. Devaney: No further questions, Your Honor.

Mr. Shapiro: No questions, Your Honor.

The Court: Come down.

(Witness excused)

Mr. Devaney: Mr. Lanier.

R. L. Lanier,

having been produced and first duly sworn as witness on behalf of the defendants, testified as follows:

Direct Examination

By Mr. Devaney:

Q. Will you state your name for the record, Mr. Lanier. A. R. L. Lanier.

Q. Are you an official of the Sheet Metal Workers International Association? A. I am the President and General Chairman of the Sheet Metal Workers, District Council 42.

Q. Is this the Constitution you gave us? (Indi-
474 cating) A. That's right.

Mr. Devaney: Would you mark this, please.

The Clerk: P.

(The referenced document was received and filed in evidence as Defendants' Exhibit P.)

By Mr. Devaney:

Q. Now, you have heard the testimony of Mr. DuPont and the stipulation by Mr. Milledge. Is that stipulation that you have provisions similar to those contained in the IBEW agreement, do you have any reservation about this? A. No, I do not.

Q. Now, Mr. Lanier, has any disciplinary action been taken by your—by the Sheet Metal Workers International Association against any employee of the Florida East Coast Railway Company since January 23, 1963? A. No, sir.

Mr. Devaney: No further questions of this witness, Your Honor.

Mr. Shapiro: We have no questions, Your Honor.

(Witness excused)

475 Mr. Devaney: Mr. Dubberly.

J. E. Dubberly,

having been produced and first duly sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

By Mr. Devaney:

Q. Mr. Dubberly, would you please state your name for the record. A. J. E. Dubberly.

Q. Are you an official of the Brotherhood of Railroad Signalmen? A. I'm General Chairman of the Grievance Committee.

Q. And this is the Constitution that you furnished? A. Pardon?

Q. This is the Constitution that you furnished? (Indicating) A. Yes, sir, that's it.

Mr. Devaney: Would you mark this, please.

The Clerk: Q.

(The referenced document was received and filed in evidence as Defendants' Exhibit Q.)

476 By Mr. Devaney:

Q. Now, you have heard the stipulation and the testimony of Mr. DuPont concerning the fact that you have similar provisions in your Constitution to those that were testified to by him in connection with the IBEW.

Now, do you have any reservation about that stipulation? A. No.

Q. Now, since January 23, has your organization taken disciplinary action against any employee of Florida East Coast Railway Company? A. How is that?

Q. Since January 23, 1963, has the Brotherhood of Railroad Signalmen taken any disciplinary action against any employee of Florida East Coast Railway Company? A. No, they haven't, not to my knowledge.

The Court: Well, it would be taken in your Committee, wouldn't it?

The Witness: Pardon?

The Court: You said you were General Chairman or

Chairman of the Grievance Committee?

477 The Witness: Yes, sir.

The Court: You can answer no?

The Witness: Yes.

The Court: Straight out without saying "not to my knowledge".

The Witness: Well—

The Court: It would seem to me.

The Witness: I will answer no, then.

By Mr. Devaney:

Q. Now, the Brotherhood of Railroad Signalmen are not members of System Federation 69, are they? A. No; no, sir.

Q. Now, these are the two documents market for identification as Defendants' Exhibits G and D. Did your organization promulgate a similar document to this? A. Yes, they did.

Q. You did? A. Yes, sir, we did.

478 Q. Is it substantially identical to this? A. Well, I believe it is.

Q. Did you receive notice, or copies, or knowledge that organizations other than System Federation 69 and this one by the Brotherhood of Railroad—Railway Clerks had issued a document like this? Did you know of any others, other than these two, plus your own? A. No.

Mr. Devaney: I have no further questions of this witness.

Mr. Shapiro: No questions.

Cross Examination

By Mr. Milledge:

Q. The Signalmen are on strike? A. Yes, sir.

Q. You are one of the eleven cooperating non-ops? A. Yes.

Mr. Milledge: That's all.

The Court: Come down.

(Witness excused)

479 Mr. Devaney: Mr. Osban.

B. R. Osban,

having been produced and first duly sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

By Mr. Devaney:

Q. Mr. Osban, would you state your name for the record, please? A. What's that?

Q. State your name for the record, please. A. B. R. Osban.

Q. And do you hold a position in the International Brotherhood of Boilermakers? A. Local Chairman.

Q. And this is the Constitution that you produced? (Indicating) A. Yes, sir.

Mr. Devaney: Would you mark this, please.

The Clerk: R.

(The referenced document was received and filed in evidence as Defendants' Exhibit R.)

480 By Mr. Devaney:

Q. Now, you have heard the testimony of Mr. DuPont and the stipulation by Mr. Milledge. Do you have any reservations concerning his stipulation that your Constitution has similar provisions to those contained in the IBEW Constitution? A. I presume it is.

Q. You don't disagree with that stipulation? A. No.

Q. Now, since the strike began on January 23rd, has disciplinary action been taken by the International Brotherhood of Boilermakers against any employee of the Florida East Coast? A. Not to my knowledge.

Q. And would this come to your knowledge? A. Not necessarily.

Q. I see. And what is your position again, sir? A. Local Chairman.

Q. Local Chairman? A. Yes, sir.

Q. And a Local Chairman is only over one locality? A. Yes, sir.

Q. Whereas— A. Or where work is being done at
481 points they don't have one in our craft, then I might have—

Q. I see. A. —something to do with it.

Mr. Devaney: I have no further questions of this witness, Your Honor.

The Court: Was he served a subpoena?

Mr. Devaney: Yes, he was, Your Honor; or at least we had him listed.

You did receive the subpoena, didn't you, Mr. Osban? Did you receive a subpoena?

The Witness: Yes, sir.

The Court: You haven't anything further?

Mr. Milledge: No further questions.

(Witness excused)

Mr. Devaney: Mr. I. E. Hamilton.

482 **I. E. Hamilton.**

having been produced and first duly sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

By Mr. Devaney:

Q. Would you state your name again for the record, please, Mr. Hamilton. A. I. E. Hamilton.

Q. And are you an official of the Order of Railroad Telegraphers? A. I am General Chairman of the System Division 87, F.E.C. Railroad.

Q. And these two documents are the Constitution and the By-Laws that you furnished? (Indicating) A. They are.

The Clerk: Defendants' Exhibits S—do you want this all one?

Mr. Devaney: Might as well.
The Clerk: Defendants' Exhibit S.

(The referenced material was received and filed in evidence as Defendants' Exhibit S.)

483 By Mr. Devaney:

Q. Now, since January 23rd, Mr. Hamilton, has any disciplinary action been taken against any employee of the Florida East Coast Railway Company? A. None coming under our agreement, no.

Q. What do you mean "none under our agreement"? A. Well, those are the only ones I can answer for.

Q. I mean, what— A. I mean no telegrapher has been disciplined.

Q. I understand. I follow you.

You are saying that your union hasn't taken any disciplinary action then against any employee of the Florida East Coast Railway Company? A. None whatever.

Q. Now, is there any qualification or reservation that you wish to make with regard to the proposed stipulation by Mr. Milledge?

Now, he proposed— A. This speaks for itself. (Indicating) A member joining the order signs a pledge to live up to the laws and—to the laws and edicts of the order. But there's no long, drawn-out pledge like you had in Mr. DuPont's.

Q. Yes. Now, you are saying, however, that if he worked for an employer with respect to whom the telegraphers have an authorized strike, he would be subject to expulsion; isn't that—I mean, that's what Mr. DuPont had testified to. A. No, it doesn't say that.

484

Q. It doesn't say that? A. It doesn't say that. He would later be given a chance to clear himself, or whatever is necessary. He will be given a fair and impartial investigation.

In our case here, we are holding all of those in abeyance

until the strike is over, and no decision has been made on them.

Q. You mean you are going to try them after the strike is settled? A. No, I didn't say that.

Q. I'm sorry, I didn't understand.

You said you are holding— A. I said we are just leaving that matter in abeyance.

Q. What's the matter you're leaving in abeyance? A. The question of any of our members who are working for the F.E.C.

Q. You mean complaints have been filed or charges have been filed that members are working? A. No charges have been filed but I have received information that they are working.

485 Q. That they are working? A. That's right.

Q. And you are holding this whole matter in abeyance until the strike is over? A. That's right.

Q. This means that charges could be preferred after the stirke is over? A. They could be, yes.

Q. And they could be expelled as a result of this? A. Yes, they could be.

Q. Has any person been admitted to membership since January 23, 1963, who is currently working for Florida East Coast? A. No, no one has applied.

Q. Now, as I read Article 2, Section 4, on page 9, among other provisions—or do you have that? A. I have it.

Q. Page 9. A. That's right.

Q. Now, this provides, among other things, that any member of a division may protest against the admission of any applicant. A. That's right.

Q. And the next paragraph says that if five mem-

486 bers protest the admission of any applicant for membership and if the supporting reasons and evidence are construed sufficient by the division officers to justify the objections, the applicant shall be declared rejected. A. That's right.

Q. And that—in other words, that would bar an ap-

plicant from consideration without a vote of the membership? In other words, five members plus the officers would be sufficient; isn't this correct? A. Well, in the first place, in order to get an application in, he has to have three regular people to recommend his application but it takes five to over-ride the application and keep him from becoming a member. And they've got to have good and sufficient reason.

That has been done, was done a short time before the strike.

Q. Now, what was this that was done a short time before the strike? A. I understand we had a member—we had an applicant that we did not accept right under this particular rule.

Q. Yes. You mean where five people protested? A. That's right.

Q. Now, Article 12, Section 10, page 94, provides—

Article 12, in general, is entitled, "Misconduct and
487 Penalties", and Section 10 provides:

"Accepting employment on any transportation company in any capacity where an authorized strike of the Order or any of its subordinate divisions exists."

A. That's right.

Q. So that that makes that act of accepting employment on the Florida East Coast an item subject to misconduct and penalties under Article 12? A. After he is given a fair and impartial trial.

Mr. Milledge: I believe this is what we stipulated. This was the same as all the rest.

Mr. Devaney: I realize, Mr. Milledge, but Mr. Hamilton indicated that there were some differences here and I felt obligated, in view of this, to review it. Otherwise, I quite agree with you.

No further question of this witness, Your Honor.

(Witness excused)

Mr. Devaney: The next witness will be Mr. Wyckoff.

488 **R. W. Wyckoff,**

having been produced and first duly sworn as a witness on behalf of the plaintiff, was recalled as a witness on behalf of the defendants and testified further as follows:

Direct Examination

By Mr. Devaney:

Q. Mr. Wyckoff, you testified yesterday in this case and the oath will still be applicable today. You understand that? A. Yes, I do.

Q. Mr. Wyckoff, has it been a practice of the Florida East Coast for some period of time to take stenographic notes of all negotiating sessions? A. It has to my personal knowledge,—

Mr. Milledge: Excuse me.

The Witness: —since 1954.

The Court: Since when?

The Witness: 1954.

489 Mr. Milledge: We object because we feel this is irrelevant and not germane to the issues before the Court.

Mr. Shapiro: Your Honor, I would join that objection to the line of questioning. The reasons are substantially that the occasion, the causes which led to the breakdown of the negotiations, are not really—are not relevant to the complaint.

The Court: I'm going to overrule the objection and let the testimony stand that that's their practice.

By Mr. Devaney:

Q. Now, was this—were the minutes taken consistently from 1954 in all negotiations with unions, Mr. Wyckoff? A. Yes, it was.

Q. Was there ever any occasion prior to 1963 that any organization refused to bargain while you were taking

stenographic notes of the meetings? A. No, that question never came up.

Q. As a matter of curiosity, was a public stenographer used on each of these occasions? A. No. Prior to March 15, 1963, it was done by a member of the negotiating
490 staff or team who was qualified to take shorthand.

Q. And since that time, why hasn't that been done? A. Well, because of the fact that I have no one on the staff now who is qualified to take shorthand and I don't have available secretarial help I could assign such duties.

Q. Now, in 1963, was there occasions on which negotiations, before August, were conducted with the unions in the presence of a Court Reporter? A. Yes, in the month of June there were a number of conferences held with various unions in connection with Section 6 notices that they had served.

Q. This was a notice that the unions had served? A. Yes, that's correct.

Q. And there was a Reporter present at each of those meetings? A. That's correct.

Q. And they obviously did not walk out if they continued the negotiations? A. That's right. The negotiations were continued with the Court Reporter present.

Q. Now, let's digress just one moment, Mr. Wyckoff: From 1954, were there occasions during which a Mediator from the National Mediation Board was present when stenographic minutes of the meeting were being
491 taken? A. Yes, on several occasions.

Q. Could you tell us the names of the Mediators who were present on such occasions? A. Well, I can't recall them all at this time. Warren S. Lane was one. James Holleran was another.

Q. Did they ever object to your taking stenographic minutes? A. No, not at all. In fact, they made notes themselves.

Q. Did they take stenographic notes? A. I don't believe either one of them—I believe they wrote them out in longhand.

The Court: You think they had a pad there and made some notes as they went along; is that what you are saying?

The Witness: Correct.

By Mr. Devaney:

Q. Have any of the union representatives made minutes during the course of your negotiations? A. Yes. A number of them make extensive notes.

Q. Could you give us an example of some of those who do? A. Vice-President Chester of the Trainmen's Organization is one. Former General Chairman Baum-
492 berger of the Trainmen's Organization is another. James Bearden, Grand Vice-President of the Clerk's Organization, is another.

Q. Now, when was the first time, Mr. Wyckoff, that there was a refusal on the part of the unions to meet in the presence of a Court Reporter? A. It was in connection with the notice I served to cancel the union shop. That's the notice of July 31, 1963.

Q. And that was the meeting that was scheduled for August 29? A. That's correct.

Q. Now, did you—was one of the Mediators assigned by the Mediation Board in January of 1964 a Mr. Newlin? A. Yes, I believe his name is J. Earle Newlin.

Q. With respect to which cases was Mr. Newlin assigned, involving what organizations; if you remember, Mr. Wyckoff? A. He was assigned to mediate five cases involving the International Association of Railway Employees.

Q. Tell us what occurred when Mr. Newlin arrived on the scene?

Mr. Shapiro: Objection, Your Honor. This line of questioning is not relevant or material to the issue in this action.

Mr. Devaney: Your Honor, we feel that it is
493 material because it will demonstrate that Mr. Newlin declined to proceed with mediation, as he is required or is obligated under the Act to do; and this is merely one further stage in the failure of the Mediation Board to perform properly its duties as imposed upon it by the Act.

The Court: Objection sustained.

In other words, I reach the conclusion that this thing wasn't relevant, reaching out from the other side to get it, it follows for me to—

Mr. Devaney: I understand.

For the record, may I say we would like to make a proffer of proof?

The Court: You can make a tender if you like.

Mr. Devaney: Tender and offer.

The Court: Dictate it into the record. I would be glad to have you do it.

Mr. Devaney: Yes, sir.

If permitted to do so, the defendant would prove
494 by testimony of this witness that Mr. Newlin declined to meet in the presence of the Court Reporter, that he refused to call a meeting between the company and the IARE, even though the IARE had told Mr. Newlin and the company that it did not object to meeting in the presence of a Court Reporter.

Further, that the company urged Mr. Newlin to remain either on the premises or in his own motel room while the company met further with representatives of the union, and if and when they reached a point that they could not proceed further without the assistance of the Mediator, that the Mediator would be called to talk to the parties individually to try and work out an agreement, and that all such individual meetings were to be in the absence of a Court Reporter; that Mr. Newlin refused to do so and that he left without making any further attempt to mediate the dispute.

The Court: I'm not quite clear when this occasion was.

Mr. Devaney: This was in 1964. It was approximately March.

Is that right?

The Witness: March 18th through 20th.

495 Mr. Devaney: March 18 through the 20th of 1964, Your Honor.

The Court: And that was in connection with the IARE, some cases?

Mr. Devaney: With the IARE cases, Your Honor.

By Mr. Devaney:

Q. Mr. Wyckoff, did you—

The Court: That completes the proffer?

Mr. Devaney: That completes the proffer, yes, Your Honor.

The Court: All right. It's excluded on the objection already made.

By Mr. Devaney:

Q. Mr. Wyckoff, following the assignment of Mr. Newlin in connection with the IARE cases, did you have occasion to write Mr. O'Neill, who is the Chairman of the National Mediation Board? A. Yes, I wrote to Mr. O'Neill, I believe the date was April 21st, calling his attention to the excessively large number of cases which had been

495 docketed by the Board involving disputes on the Florida East Coast and on which no active mediation had been taken, many of those cases having been docketed later than the cases on which—I mean, earlier than the cases on which Mr. Newlin had appeared on the scene to mediate.

Q. Now, is this, Mr. Wyckoff, a copy of your letter to Mr. O'Neill of April 21, 1964? A. Yes, it is.

Q. Now, did you receive any reply to that letter of April 21? A. I received no reply and, on May the 5th, I

believe it was, I again wrote to Mr. O'Neill concerning that matter.

On May the 11th, I believe, I received a response from Mr. Thompson calling—

Q. Let me interrupt you a minute now. I'm looking at a letter which is dated April 28. Is that the one that you meant to refer to rather than May the 5th? A. That's correct. I'm sorry. I had the date wrong.

Q. This is the second—this is the second letter to Mr. O'Neill? A. That's correct. The letter of April 28 is the second letter.

Q. Now, had you heard from your first letter when
497 you—you wrote the first letter April 21, 1964? A. That's correct.

Q. Had you heard by the time you wrote the letter of April 28? A. No, sir. I had heard no word from the Board.

Q. Did you later hear from the Mediation Board? A. Yes. I received a reply from Mr. Thompson. He advised that Mr. O'Neill—

The Court: He didn't ask you what he said.

The Witness: I'm sorry.

By Mr. Devaney:

Q. Now, what was the date of that letter, Mr. Wyckoff? A. May 11.

Q. Did you ever get a letter directly from Mr. O'Neill? A. Yes. On May the 14th, I received a letter from Mr. O'Neill.

Q. And did you reply to that final letter from Mr. O'Neill? A. Yes, I did. On May 18th, I made a response to that.

Mr. Devaney: I ask that these be marked for identification and I now show them to the other attorneys.

498 The Court: Do you mind if we give the whole group—

Mr. Devaney: No, they are altogether, Your Honor.
The Clerk: T.

(Thereupon, the referenced documents were marked Defendants' identification Exhibit T.)

Mr. Shapiro: Are you offering these, Mr. Devaney?
Mr. Devaney: I haven't yet; I shall in due course. Yes, if it will simplify matters, I will offer Defendants' Exhibit —the exhibits marked as Defendants' Exhibit T in evidence.
Mr. Shapiro: I shall object to the offer, Your Honor, on the ground that these letters are not relevant to the issues in this case or material in respect to the issues in this case.
It has been established that the Mediation Board has not conducted mediation with respect to the union shop dispute or with respect to the September 24, 1963 "Uniform Working Agreement", except as concerns the International Association of Railway Employees. And
499 this exchange of correspondence which relates to the carrier's demand for mediation on all the cases that F.E.C. has with the Board, including many cases not involved in this action, is not relevant or material.
Mr. Devaney: Your Honor, we feel that this is entirely relevant.
In the first place, the letter of April 21st was written before there was any litigation in this case.
The Court: After the Trainmen case was decided and before this case was brought?
Mr. Devaney: That's right.
The Court: I say it was after the Trainmen case was decided and on appeal, and before this case was brought?
Mr. Devaney: That's right. And before any litigation in this case. Now—
The Court: They are excluded. Mark them for identification only.

By Mr. Devaney:

Q. Now, Mr. Wyckoff, following your letter of
500 May 18 to Mr. O'Neill, has there been any further response from Mr. O'Neill or the Mediation Board?

Mr. Shapiro: Objection, Your Honor.

The Court: Well, I assume the answer is going to be no, isn't it?

The Witness: That's correct.

The Court: All right. To nail this other thing down, this is the complete correspondence.

Mr. Milledge: Judge, while we've got just a moment, we've had these people here now for three days and I hope maybe, if there's going to be any more of the union people called, we might find that out so we could let them go.

The Court: Maybe the assumption was unwarranted but I assumed, when he quit calling these chairmen and representatives, that he didn't intend to call any more; is that a fair assumption?

Mr. Devaney: I'm sorry, Your Honor. Did I in-
501 tend to call any of these gentlemen further?

The Court: Yes.

Mr. Devaney: No, I have no intention of calling them further.

The Court: They may be excused then under the subpoena?

Mr. Devaney: Yes.

The Court: Of course, some of them—a great many of them represent plaintiffs in intervention here.

Mr. Devaney: Yes, sir.

The Court: Maybe they all do. They are certainly welcome to stay but there is no requirement that they remain longer.

Mr. Milledge: Fine. That was the ruling I was seeking.

The Court: Mr. Devaney has merely released them from their subpoena.

Is that clear to all you gentlemen?

502 By Mr. Devaney:

Q. Mr. Wyckoff, just for the clarification, the IARE was the organization with respect to whom the September 24 notice was not placed into effect because they continued to bargain; isn't that correct? A. That's correct. They continued negotiations.

Mr. Devaney: I have no further questions of this witness at the moment, Your Honor.

Cross Examination

By Mr. Milledge:

Q. Mr. Wyckoff, I think this is what you testified to but I just wanted to be clear:

It wasn't until after the strike, until 1963, that you hired the public stenographer or the Court Reporter to sit in on these negotiations; is that correct? A. Well, that was the result of the shortage of secretarial—

Q. Well, all right.

The Court: At any rate, you had had somebody from your staff there. You never had a Court Reporter there until after the strike?

503 The Witness: That's correct.

By Mr. Milledge:

Q. Up to that time, each party took his own notes? A. Well, it was a little more than that.

Q. Well— A. A stenographic record was made of what transpired.

Q. Did you deliver it to the other party? A. No, I did not deliver it.

Q. That was just for your own use? A. Yes.

Q. Right. And they could take their own notes if they wanted to, and you took your notes? A. That's right.

Q. But starting after the strike, you started bringing in —what office is it? You used an office here in Jacksonville, did you not? A. Yes. We have a public Court Reporter that came in, that's right.

Q. Well, what is the name of that office? A. Mr. Rosenfeld.

Q. Sam Rosenfeld. So, since the strike or since—it was about—when was it you first used him? A. I think I testified just a minute ago it was March 15, 1963.

504 Q. All right.

Mr. Milledge: That's all.

The Court: You can come down.

(Witness excused)

The Court: What else do you have, Mr. Devaney?

Mr. Devaney: Your Honor, at this—this substantially completes it. I was going to ask if you would like to adjourn.

The Court: A little louder, please.

Mr. Devaney: I would like to ask if we might adjourn for the day, or take a short recess.

As far as I know, this completes the presentation of witnesses by the defendants. Before making an absolute commitment, I would like a brief recess.

The Court: Well, I'm agreeable. I was hopeful we could finish today, just as I hoped we could finish it yesterday, but I am not disposed to hurry anybody or make my own time requirements the basis for shortening up what-

505 ever you gentlemen want to put in, whatever submission you want to make.

Now, you gentlemen might consider that, if you have rebuttal, you should be prepared to go ahead with it in the morning unless, in looking over his notes and reconsidering it, Mr. Devaney finds there are little bits and pieces he wants to put in. He has substantially completed it, as I understand him. And I think you both then should also be prepared to argue the case in the morning.

Mr. Shapiro: Yes, sir.

Mr. Devaney: Yes, sir.

The Court: Assuming that he closes and your rebuttal is short, then be ready to go ahead and argue. I think it would be an imposition on counsel and the attaches of the Court for me to keep you here later tonight.

Mr. Milledge: Your Honor, I may have to ask your indulgence that Mr. Rutledge be here tomorrow and I not be here. I'm not sure that my schedule has been rearranged or not.

506 The Court: Well, whichever it is, and—

Mr. Milledge: We will be prepared to make a short argument.

The Court: Well, we will leave it at that, Gentlemen. Good night, Gentlemen.

Take an adjournment until 9:30 in the morning.

(Thereupon, at 5:20 o'clock p.m., on Wednesday, May 27, 1964, the Court adjourned to be reconvened at 9:30 o'clock a.m. on Thursday, May 28, 1964.)

507 (At 9:30 o'clock a.m., on Thursday, May 28, 1964, pursuant to adjournment of the preceding session, the Court reconvened and the following further proceedings were had):

The Court: Good morning, Gentlemen.

Mr. Milledge: Good morning, Judge.

Mr. Shapiro: Good morning.

Mr. Devaney: (Tendering intruments to the Court) Your Honor, these represent the copies that we made of Exhibits so that—

The Court: These, you are substituing?

Mr. Devaney: Yes, Your Honor.

The Court: You are going to return these papers to the various witnesses who produced them?

Mr. Devaney: Now, the only—

The Court: Some of them may have left yester-
508 day afternoon, in which case I suggest you return them to Mr. Milledge and he can distribute them.

The Clerk: Yes, sir.

The Court: Some of them were anxious to get away and did leave yesterday afternoon.

Mr. Devaney: I would like to recall to the stand Mr. Wyckoff.

The Court: Come back, please.

having previously been sworn, was recalled to the stand and testified further as follows:

Further Direct Examination

By Mr. Devaney:

Q. Mr. Wyckoff, have there been occasions at which a Court Reporter was present when a Federal Mediator was present? A. Yes, there have.

Q. And could you tell us who the Federal Mediator was? A. Frank K. Switzer.

Q. And at this meeting, there were also representatives of the various unions present? A. Yes, mostly Grand Lodge officers.

509 Q. Do you recall when such a meeting occurred? A. On July 24, 1963.

Q. Now, were there any occasions when meetings were recorded in any way other than by stenographic reportings? A. Yes. I have had meetings that were recorded by means of a tape recorder.

Q. At which a Mediator was present?

Mr. Milledge: Excuse me. I'm not sure what kind of meetings we are talking about. Are we still on mediation or—

Mr. Devaney: Yes, sir.

By Mr. Devaney:

Q. The Mediator was present at such times? A. Yes, Mediator Switzer was present at those meetings.

The Court: I didn't hear who you said was present.

The Witness: Mediator Frank Switzer.

The Court: Switzer.

By Mr. Devaney:

Q. Now, were copies of these transcripts furnished to the Mediator who was present at each of these meet-

510 ings? A. Yes, they were.

Q. Now, Mr. Wyckoff, over the years, has there been any occasion to make use of the minutes of these negotiating meetings? A. Yes. They are referred back to frequently.

Q. In what manner, Mr. Wyckoff? A. Well, frequently a question arises as to the intent of the parties at the time a rule was negotiated or revised. And that is the main reason for referring back to them.

Q. What sort of—You mean these are disputes with the unions involving the application of a particular agreement? A. That's correct. And frequently those disputes go to the Railroad Adjustment Board in Chicago and, of course, the Board, with usually a neutral sitting-in on the case, refers to the intent of the parties at the time a rule was negotiated to determine whether or not it was being complied with.

Q. And in these proceedings before the Adjustment Board, have you had occasion to refer back to these minutes and make use of the content of these minutes? A. Oh, yes. The information contained in the minutes is invaluable in preparing cases for submission to the Board.

Q. Do you also have any occasion to refer to the minutes in your discussions with the unions concerning these
511 various cases that are brought? A. Yes. At preliminary discussions on the property, frequently reference is made to the discussions and what transpired.

Mr. Devaney: I have no further questions at this time, Yopur Honor.

Mr. Shapiro: I have a few questions, Your Honor.

The Court: Yes, sir.

Further Cross Examination

By Mr. Shapiro:

Q. Mr. Wyckoff, when was the Mediation session at which a tape recorder was used? A. There were two such sessions. One was on June the 18th. The other was on June 22nd, 1963.

Q. Both in 1963? A. That's correct.

Q. Had a tape recorder been use in any session involving a Section 6 notice, either private negotiations or mediation, prior to 1963? A. Prior to 1963, no; because, as I said yesterday, a member of my staff at that time was
512 qualified to take the minutes in shorthand.

Q. Now, prior to 1963, did you have verbatim transcripts prepared of negotiation sessions? A. Not necessarily verbatim, no; but a resume was made of what transpired. In other words, it would be taken down verbatim and then a resume would be transcribed.

Q. You testimony is that you did have a verbatim shorthand record prepared? A. That's correct, because I myself did it on a number of occasions.

Q. You take shorthand? A. Yes, I do.

Q. And you prepared verbatim shorthand records? A. I transcribed—I transcribed it in a resume form so that—

Q. So that they were not verbatim records; they were resumes? A. The transcription was a resume but, during the process of the discussions, it was taken down verbatim.

Q. And this continued, so that you had a word-for-word record; is that right, in shorthand form? A. In shorthand, that's correct.

Q. You yourself, while you were negotiating, at times made a verbatim record in shorthand? A. I didn't
513 say that.

Q. I'm asking that. A. No. While I was on the negotiating team of the railroad, from 1954 on until December of 1960, I did it. In December of 1960, I was made Director of Personnel and then, at that time, another member of my staff was qualified to take shorthand.

Q. Between 1954 and 1960, you testified—I'm just trying to clear this up— A. Uh-huh.

Q. Is it your testimony that, between 1954 and 1960, you yourself took a verbatim shorthand record of the negotiations? A. That's correct.

Q. Were you also actively particpating in the discussions? A. I participated in them,—I won't say actively—because the man who was negotiating did all the talking usually.

Q. And you simply sat and took a shorthand transcript down; is that right? A. That's correct.

The Court: What officer of the railroad was that,
514 the Chief Negotiator, during those days?

The Witness: Mr. C. L. Beals.

By Mr. Shapiro:

Q. Is he in the Personnel Department? A. He was the Chief Operating Officer of the railway and he handled the negotiations.

Q. When was the Court Reporter used for the first time, Mr. Wyckoff, in a negotiating session? A. On March 15th, 1963.

Q. Now, just to clear up your testimony at this time in the light of your testimony yesterday: Would it be accurate to state that no verbatim transcript of the negotiating sessions was prepared prior to 1963? A. I would say that was correct, yes. There really wasn't any reason for having a verbatim transcript as long as we had the intent of the negotiators; and I had the shorthand notes to refer back to.

Q. Now, did other parties make notes of some kind during the negotiating sessions? A. Oh, yes.

Q. And can you testify as to the use that these other parties might make of them? A. I assume they referred back to them at times subsequent to the negotiations.
515 I don't know what they did with them.

Q. Does the Florida East Coast Railway Company have stenographers in its employ at the present time? A. Yes, it does.

Q. And would they be available to assist in preparing notes from which resumes could be made? A. We don't have the availability of secretarial help that we had prior

to the strike, and because of a shortage of secretarial help, I had to devise other means of recording these conferences.

Q. So the means you devised was to hire a Court Reporter? A. That, or use a tape recorder.

Q. Why didn't you just hire an ordinary stenographer to make the same kind of notes that had been made previously? A. Because a stenographer has to have quite a degree of ability to record the conferences verbatim. Someone—

Q. Do you have sufficient shorthand skill to take verbatim notes? A. I don't say I have at this time, because I haven't utilized it since 1960; but prior to 1960, I did.

Q. Did the—When did the representatives of the labor organizations first question the use of a Court Re-
516 porter? A. I believe that they questioned the use of a Court Reporter at the meeting of March 15th.

Q. And did they reiterate that objection at any time? A. Well, they questioned the use of the Court Reporter but they remained and negotiated.

Q. At that time—now, when were they—was it a company policy—let me rephrase the question.

Did you ever inform the representatives of the labor organizations that the company would hereafter insist upon a Court Reporter? A. I told them that it would be the policy from here on to have a Court Reporter present during negotiating sessions, yes.

Q. When was that? A. Oh, I don't recall the exact date. I believe it was the meeting of June 15th on the employees' Section 6 notices—on or about June 15.

Q. And what did the employees tell you? A. Well, they reiterated their objection to a Court Reporter being present but they continued to negotiate on their notices.

Q. Mr. Wyckoff, have you participated in mediation sessions? A. Yes, I have.

517 Q. Was a verbatim transcript ever prepared of a mediation session, prior to the sessions which you described in your direct testimony? A. I won't say that

there was a verbatim transcript made. A verbatim record was made at a number of those and I made that record in shorthand.

Q. You state that it was a verbatim record? A. I took the notes in shorthand verbatim, correct.

Q. Mr. Wyckoff, did you ever dispute the authenticity of the notes of any labor organization on a recording—on a negotiating or grievance session? A. I don't recall that I ever saw the notes of a labor organization to review them. I saw them taking the notes.

Q. Now, was there ever a dispute about the authenticity of your notes? A. I believe on occasions that they have stated they would not be bound by any record that was made, unless it was signed by them.

Q. Now, these typed—let me distinguish between the stenographer's notes and the typed resume in my questions so it will be clear:

These typed resumes were for your use in taking a position on what the intent of the parties was; is that right?

A. That's correct. Frequently a question arises as
518 to the intent of the negotiating parties and, in order to be certain of the intent, you refer back in the file to the minutes of what transpired.

Q. And then these are used to state a company position in a grievance proceeding and the like; is that right? A. Not only to state the position but to state the intent of the negotiating parties at the time the rule was negotiated.

Q. You mean you take your notes and state that this is evidence of what the intent of the parties was? A. That's correct.

Q. Your own notes? A. Oh, sure.

Q. Your own resume? A. That's correct. In fact, I had occasion just recently where the Trainmen's Organization disputed the intent of a rule and I referred back in the file to the intent of the negotiator and saw it was completely contrary to what the Trainmen's Organization contended.

And I went to him and asked him about it and he gave me a sworn affidavit as to what his intent was.

The Court: Went to whom?

The Witness: This happened to be Mr. Beals.

519 The Court: Based on what your notes showed, he gave you a sworn affidavit of what his intent was?

The Witness: That's correct.

The Court: Mr. Beals is pretty elderly now, isn't he?

The Witness: Yes, he's in his 70's, I believe 75.

The Court: He retired just about the time the road came out with the organization, or just before?

The Witness: Just before, I believe.

Mr. Shapiro: I have no further questions.

Further Cross Examination

By Mr. Milledge:

Q. I believe you statesd that the reason you changed the practice was because of the shortage of personnel caused by the strike; is that what you said? A. I said a shortage of secretarial help.

Q. Your'e not telling the Judge that you were using

520 union stenographers to take down your notes at bargaining sessions, are you? A. I'm not saying I was using union stenographers, no. But those stenographers were used for other purposes, to take the place of union members who were out on strike when the strike began.

Q. All right. So the reason, you are telling His Honor, that the reason you change this policy in 1963 was from a shortage of manpower due to the strike? That's your testimony? A. That's correct.

The Court: Well I have one question. I'm speaking of the sessions when you used the tape recorder.

Were those out in the open, like Mr. Sheridan, my Reporter's, gear is here?

The Witness: Yes, sir.

The Court: Or were they concealed microphones and the recorder in another room?

The Witness: No, sir. The recording device was sitting right on the table alongside of Mr. Switzer. In fact,
521 he asked—one of his first questions was, "Is this thing operating?".

Mr. Shapiro: May I ask one further question, Your Honor?

The Court: Yes, sir. I wanted to be sure in my mind when this was that Mr. Switzer was present. What were the dates of those two sessions? Did you state?

The Witness: If my memory serves me correctly, Your Honor, they were June 18 and 22, 1963.

The Court: That's what my notes showed but I wasn't sure it referred to this matter.

All right, thank you.

You may go ahead.

Further Cross Examination

By Mr. Shapiro:

Q. Do you recall any occasion on which there was a question as to whether or not the tape recorder was on in a mediation session? A. Yes, I do.

Q. What was that? When was that? A. That was a discussion with Mr. O'Neill and Mr. Holleran, who is
522 also a Federal Mediator. They participated in a meeting with Mr. Thornton and myself and several members of my staff. The tape recorder was sitting within three or four feet of Mr. O'Neill's arm. He could reach out and touch it. There was a man sitting alongside of it operating it and, after approximately ten or fifteen minutes, he wanted to know whether the machine was being utilized. I told him it was.

Q. The discussion had gone on ten or fifteen minutes and he stated— A. That's right.

Q. And then what happened? A. He requested that the machine be removed and I told him no, that I was making a record of what transpired. Of course, that was obvious,

or should have been obvious to him. He saw the machine in operation, or should have seen it.

And when I would not remove it, why, he left the room; he and the other Mediator, Mr. Holleran.

Q. All right, Mr. Wyckoff, will your company negotiate without a Court Reporter present or a tape recorder? A. We will meet with representatives of the Government without a tape recorder or a Court Reporter present; but any time that a union representative is present, a verbatim record will be made of what transpires.

523 Q. Then your answer to my question is that—let me be clear:

You will not negotiate with a union representative without a means of making a verbatim transcript; is that right? A. That's correct.

Mr. Shapiro: Thank you, Mr. Wyckoff. I have no further questions.

Redirect Examination

By Mr. Devaney:

Q. Mr. Wyckoff, before 1963 when the minutes were taken by you or a member of your staff, was there any occasion when the union representatives made any comment about this practice? A. Yes, they observed the notes being taken and I think, on one or two occasions, they requested copies of the transcripts.

Q. There was no doubt that they were aware that this was being taken? A. Oh, no. They knew it was being taken. I don't recall any protest of it being taken, but I think they did request copies of the transcript.

Q. Now, in this meeting where you mentioned
524 these International officials, could you tell us who some of those individuals were? A. As best I recall, Mr. Leighty, Mr. Dennis; Mr. Leighty is of the Telegraphers' Organization and also Chairman of the Cooperating Labor Organizations involved in the present work stoppage.

Mr. Dennis, who is Grand President of the Clerks' Organization.

Mr. Bernhardt, who is President of the—one of the shop crafts.

Mr. Fox, who is President of System Federation 69.

Mr. Crotty, who is President of the Maintenance of Way Employees.

That's all I can recall at this moment.

Q. Was any comment made by any of those union officials concerning whether a record was made of the negotiations on any other railroad? A. Yes. Mr. Leighty commented that—

Mr. Milledge: Excuse me. Objection; hearsay.

The Court: Objection sustained.

By Mr. Devaney:

Q. Was there an occasion later, Mr. Wyckoff,
525 when Mr. Leighty was attending a meeting at which a Court Reporter was present? A. Yes. He and Mr. Schoene, who is an attorney for the Railway Labor Executives Association, attended such a meeting in December of 1963.

Q. Do you recall, Mr. Wyckoff, whether there was any objection to the reporter being present at that time? A. To my recollection, there was absolutely no comment made at all about the recorder's presence.

Mr. Devaney: No further questions.

The Court: Recorder or Reporter?

The Witness: Reporter, I'm sorry, sir—Reporter's presence.

Mr. Devaney: No further questions.

The Court: That was Mr. Rosenfeld or one of his associates?

The Witness: Mr. Rosenfeld personally was there.

Mr. Shapiro: No further questions.

526 The Court: All right, sir, would you come down.

(Witness excused)

Mr. Devaney: Your Honor; that completes the evidence that the defendant wishes to present at this time.

Mr. Shapiro: Your Honor, the first rebuttal witness for the Government will be Mr. W. F. Howard, who testified yesterday.

The Court: Mr. Howard.

W. F. Howard.

having previously been sworn, was recalled as a rebuttal witness on behalf of the plaintiff, and further testified as follows:

Direct Examination

By Mr. Shapiro:

Q. Do you recall, Mr. Howard, that you were placed under oath yesterday? And you are still under oath. A. Yes, sir.

Q. Could you state once again the organization with which you are associated and your position in it? A. I am General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and
527 Station employees.

Q. Now, Mr. Howard, have you attended negotiating sessions on rates of pay, rules and working conditions with the Florida East Coast Railway Company? A. Many of them, beginning in 1937.

Q. And what kind of subjects were discussed in those sessions that you have attended? A. Well, I was involved in at least five mediation proceedings beginning in 1937.

The Court: '37 or '57?

The Witness: '37, Your Honor.

The Court: That was the date you gave earlier?

The Witness: Yes, sir.

The Court: I took it '57; I'm sorry.

The Witness: And the last two were in the Spring and Fall of 1962. And the '37 mediation case involved a complete agreement. We had been certified as representative

of the employees on April 10, 1937, and we began
528 negotiations in May, as I recall, in 1937 and they terminated and we engaged in negotiations intermittently until an agreement was reached through mediation on December 20, 1937.

And we were also involved in revisions of those rules in 1941, 1946, 1951; and we completely revised the agreement again in 1962.

The Court: '62?

The Witness: Yes, sir.

By Mr. Shapiro:

Q. Now, how did the parties keep track of the various discussions in the negotiations you have described? A. Well, in the 1937 negotiations, as I recall, Mr. Beals' personnel staff consisted of Mr. F. L. Atkinson, who was the Assistant to Mr. Beals. At that time, Mr. Beals was the General Superintendent. And later, Mr. G. N. Holman, neither of whom wrote shorthand and they made their notes in the same manner that I—not in the same manner I did, because I made mine in shorthand.

Q. Were your notes verbatim? A. No, they were not.

Q. Now, in the later negotiations, how did people
529 —how did the parties keep track of the various discussions? A. Well, when Mr. Beals' staff was increased and there was a stenographer on his staff, personnel staff, they made notes intermittently. But I have never know of a verbatim report having been made.

Q. Now, how do you know the stenographer wasn't taking a verbatim record down? A. Because I observed him during the negotiations. As a matter of fact, being a stenographer myself, they couldn't have kept up with the conversation that was going on.

The Court: They don't always wait for—the second fellow doesn't always wait for the other one to stop talking, like they do in Court, do they?

The Witness: Well, as a rule, one person exhausted his opinion before the other started out.

By Mr. Shapiro:

Q. Now, was this true—Did you participate in any negotiating sessions at which Mr. Wyckoff was present? A. Yes, beginning in 1954, Mr. Wyckoff was present. And one of the notable agreements that we negotiated while Mr. Wyckoff was on the staff was the agreement of
530 February 4th, 1959, dealing with automation. And there certainly were no verbatim notes made during those negotiations, which were quite extensive.

Q. How about the 1962 negotiations? A. No verbatim notes were made. Each side made notes and I do recall, as Mr. Wyckoff testified a few moments ago, that he did make some notes in shorthand but they were not verbatim. The reason why I recall him making notes in shorthand is because we discussed the different systems used—as he used as compared with what I used.

Q. Now, how do you know that his notes weren't verbatim? A. He was sitting immediately in front of me and I observed him.

Q. Was he continuously taking notes as the conversation went on? A. No, he was not.

Q. What did you observe as the discussions were going on? What was Mr. Wyckoff doing? A. Well, as the discussions were going on, as we were trying to reach an understanding on our agreement of certain language of the proposed rules, we both would make notes of how we would agree to change the language in certain rules, and he would make notes. Sometimes he made notes in longhand that I observed.

531 Q. So that you concluded from this that he was not making a verbatim record then? A. That's correct.

Q. When was the first time you participated in a negotiation at which someone was taking a verbatim record? A. It was in June of 1963. I don't recall the exact date.

Q. In June of 1963. Now, have you participated in mediation, Mr. Howard? A. I've participated in at lease five mediation proceedings with the carrier—this carrier.

Q. Did you observe anyone from the company making a verbatim record? A. No. And on the first occasion, there was no one there qualified to take shorthand notes.

Q. How about on the later occasions? A. Neither in the 1941 mediation was anyone present.

Q. Now, did you understand that the company would make available to you or to anyone else who desired it, the resume that it had prepared? A. No, I never discussed it with them. I had no occasion to use it because I had my own notes.

Q. You relied on your own notes? A. Right.

532 Q. How does one acquire a copy of the transcript prepared by the public Court Reporter? A. He has to purchase it from the Reporter.

Q. Can anybody purchase one of those? A. As far as I know, they can.

Q. So that the— A. I've never purchased one myself.

Q. If I wanted to purchase a copy of the negotiations between the Florida East Coast Company and your organization in June of 1963, could I purchase one from the Court Reporter? A. I assume that you could.

Q. So that the record is a public record? A. As far as I know.

Q. Of your private negotiations? A. Correct.

Mr. Shapiro: I have no further direct questions of this witness.

The Court: Do you have any questions, Mr. Milledge?

Mr. Milledge: No, Your Honor, I do not.

The Court: Cross-examine.

533 Cross Examination

By Mr. Devaney:

Q. Mr. Howard, did I understand you to say that you knew that Mr. Wyckoff, in 1962, was not making a verbatim

record because he sat in front of you? A. That's right.

Q. Now, you also heard Mr. Wyckoff testify that he had not made these minutes since 1960; isn't that correct? A. I don't recall his testimony.

Q. Now, prior to 1962, you said that you were positive that Mr. Wyckoff did not make a verbatim shorthand record.

Now, did he sit in front of you each time? A. He sat at the left of me.

Q. Every time from 1954? A. At all conferences.

Q. Now, how would you know whether he was taking a verbatim record or not, Mr. Howard? A. Well, I could tell by watching him. When Mr. Beals or someone else was talking, that he was not making notes. He made notes intermittently.

Q. Is this man taking a verbatim record, sitting here, Mr. Howard? A. I haven't observed him.

Q. Now, did you say that Mr. Frank Atkinson
534 could not take shorthand, to your personal knowledge? A. In 1937, he could not.

Q. You are positive of that? A. I'm positive of that because, in later years, he did learn to write shorthand.

Q. So that after 1937, he could take notes in shorthand? A. Well, it must have been at least fifteen years after that.

Q. So that, some time by 1952, he was taking shorthand; is that not correct? A. I wouldn't—I couldn't pinpoint the year, but I do know that he did learn shorthand some years later, following some trouble he had with his throat that the doctors wouldn't let him talk for several months.

Q. Now—

The Court: Who is this?

The Witness: Mr. Atkinson.

The Court: Oh, yes.

By Mr. Devaney:

Q. Isn't it true, Mr. Howard, that you ordered four copies of the transcript of one of the meetings at which

535 Mr.—the Court Reporter's name I don't remember; Sam Rosenfeld, is it? Is that the name of the Reporter? A. That's the name of the Reporter but I did not order any copies.

Q. You did not order any? A. I think that Mr. Winstead—

Q. Mr. Winstead— A. —ordered some copies.

Mr. Milledge: I missed that.

This is in 1963, I assume?

The Witness: Yes.

Mr. Devaney: That's in 1963.

Mr. Milledge: All right.

By Mr. Devaney:

Q. I wasn't certain of the date of this last mediation that you referred to, Mr. Howard. What was that year? A. 1962.

Q. 1962? A. We had two mediation proceedings during that year.

Q. This is the one you said that the agreement was
536 completely revised? A. With the exception of a few rules, but we rewrote, reprinted, the entire agreement.

Q. Now— A. That was in the Spring of 1962.

Q. Spring of 1962? A. Yes.

Q. Now, Mr. Howard, are you willing to meet with the company in negotiations with a Reporter present? A. No, I am not.

Q. Are you willing to meet if the record is made by somebody who is not a Court Reporter per se? A. No. I don't think that I would be agreeable to meeting with them where any verbatim record was kept, because I don't believe it's conducive to good-faith bargaining.

Q. Yet you make your own varbatim record of at least portions of the negotiations? A. No, I don't make any verbatim records.

Q. Why do you take—what do you write in shorthand? A. The understanding we had about whether a certain

proposed rule would be accepted or rejected or passed over to some later date for discussion of the proposed rule; the language; the change in the language of the proposed rule, which is in writing.

537 Yes. But how do you write that understanding, Mr. Howard, without writing down what has been said? A. I just make a resume. In the case of change in language, I put that down exactly as we discussed it.

Q. I see. So it's the—In other words, you don't object to having part of it verbatim but you don't want other parts of it verbatim; is that correct? A. No. The only reason why I make any record at all is it's customary for the carrier to type up the rules that we agree upon and I check that back against my notes to see that that's exactly what we agreed upon.

Q. Now, would it also follow, Mr. Howard, if the company prepares this, that they must have some record of what has been agreed upon in order to prepare the written agreement itself? A. I didn't understand the question.

The Court: Do they need some notes to write up from too?

The Witness: Yes, they make notes.

Mr. Devaney: So they need those notes—

The Court: He is asking do they need them?

538 By Mr. Devaney:

Q. They need the notes to write up the agreement, do they not, Mr. Howard? A. That's right. And many times, I'll dictate the proposal myself and many times, more often than not, those are written in longhand.

Q. Now, what is written in longhand, Mr. Howard? A. These rules that we've changed around.

The Court: The final formulation of the rules?

The Witness: Correct. Many times it will be written in longhand and sent out to a stenographer outside the room and typed up and is brought back in and we have further discussion on it, and we may make some changes beyond that.

Mr. Devaney: No further questions, Your Honor.
The Court: Anything further?
Mr. Milledge: No, sir.
The Court: Come away, Mr. Howard.
539 Mr. Shapiro: May I have one more question?
The Court: Oh, I'm sorry.

Redirect Examination

By Mr. Shapiro:

Q. Mr. Howard, why do you object to having a commercial Court Reporter present? A. I would object to a commercial as well as one employed by the company making a verbatim record, because I'll have to agree with the opinion expressed by Mr. Reynolds, Assistant Secretary of Labor. It seems that the person doing that is more interested in making a record than they are in bargaining.

Q. Do you think there's any difference between a record made by the public Court Reporter and the record made by the transcript—a record made by a stenographer employed by the company?

Mr. Devaney: Your Honor, I object to this. I think this calls for a conclusion.

The Court: You opened it up on your cross-examination, Mr. Devaney.

You may answer.
540 The Witness: You mean a verbatim record?
Mr. Shapiro: Yes.

The Court: He's asking do you make any—do you draw any distinction between one made by a regular company employee and one made by a public stenographer?

The Witness: Not a bit.

The Court: Sir?

The Witness: Not a bit; I make no distinction.

The Court: Well, I can suggest one that you suggested in your earlier testimony; that anybody that wanted one might be able to procure one from the public stenographer,

unless there was an agreement that he was instructed not to release it to any member of the public.

The Witness: I've never had any desire to secure one from either side.

541 The Court: I understand that.

The Witness: If one had been made.

Mr. Shapiro: I have no further questions, Your Honor. Thank you, Mr. Howard.

(Witness excused)

Mr. Shapiro: I would like to call one more witness. Mr. R. M. Cooke.

R. M. Cooke,

having previously been sworn, was recalled as a rebuttal witness for the plaintiff and further testified as follows:

Direct Examination

By Mr. Shapiro:

Q. For the record, will you state your name? A. R. M. Cooke.

Q. And you recall that you are still under oath from yesterday? A. Yes, sir.

Q. What organization are you with, sir? A. I'm General Chairman of the Brotherhood of Railway

542 Carmen of America and President of System Federation No. 69.

Q. This is the shop crafts organization? A. Yes, sir. That's the shop crafts organization.

Q. Now, you represent—do you participate in negotiations involving all of the shop crafts, all five unions? A. Yes, sir.

Q. It is five? A. It's six, really.

Q. Six.

How long have you been participating in the negotiations? A. Well, as General Chairman, since November 1st, 1959; and as President of System Federation 69, several

months later, eight or ten months, I can't recall the exact date that I was made President.

Q. Now, have you attended negotiating sessions with the Florida East Coast Railway Company on changes in rates of pay, rules and working conditions? A. Yes, sir.

Q. How were the records kept at these sessions for your organization? A. (No response)

Q. I'm sorry, that is a pretty vague question.

How did the parties keep track of the negotiations?

543 A. Prior to June of 1963, merely by keeping our own personal notes of pertinent points from time to time; but, beginning in June of 1963, there was a Court Reporter present.

Q. Did the company have a stenographer present at these negotiating sessions? A. No, sir.

Q. They did not have a stenographer present for your organization? A. Not at any that I attended, no, sir.

Q. Then no verbatim record was being prepared of any kind? A. None that I saw being prepared, no, sir.

Q. Now, you mentioned that up until June of 1963, no verbatim transcripts were prepared. What happened in June, 1963? A. Well, at a meeting in June, 1963, between the General Chairman of System Federation 69 and Mr. Wyckoff, there was a Court Reporter present.

Q. Did you say anything about that Court Reporter? A. Yes, sir. We began the session by voicing an objection to his presence.

Q. What happened then? A. Well, Mr. Wyckoff informed us that the Reporter would remain there and

544 would take the minutes of the session, and that also in the future that such sessions would be recorded.

Q. Have you ever seen a transcript of this session? A. Yes, sir, I have seen a copy of it, of the session.

Q. I show you a document entitled "Conference Between Florida East Coast Railway Company and Federation System 69", and listing several labor organizations, "Held at the Offices of Florida East Coast Railway Company, at

King and Malaga Streets, St. Augustine, Florida, on Tuesday, June 25, 1963, at 1:00 p.m.".

Now, is this the transcript of the meeting you have described to us? A. Yes, sir, this is the transcript made by Mr. Rosenfeld.

Q. Who was Mr. Rosenfeld? A. Mr. Rosenfeld is a Court Reporter, I believe from here in Jacksonville.

Mr. Shapiro: I ask that this be marked as Plaintiff's Exhibit—

The Clerk: No. 8. See if there is any objection.

Mr. Shapiro: I will show it to him. (Handing instrument to Mr. Devaney)

(Thereupon, the referenced document was marked Plaintiff's Identification Ex. No. 8.)

545 Mr. Shapiro: I offer this in evidence.

Mr. Devaney: Your Honor, I object only to the materiality of putting the entire transcript in. Otherwise, I have no question of the authenticity of the copy offered, but I don't see that it's material to this case; but if it is desired to put it in, I have no objection to its authenticity.

Mr. Shapiro: I shall by further questioning demonstrate the materiality of it, since Mr. Cooke has testified concerning the presence of the Court Reporter and the objection by the company—or the objection by the labor organization and the statement by the company that there would be Court Reporters present. I think that this would be most important to that testimony.

Now, we can limit the offer of the item in evidence to certain pages at the beginning.

The Court: Oh, well, put the thing in. I'm certain it isn't offered as evidence of the truth of any matters asserted there but as, I suppose, to show how the conference was conducted.

546 Mr. Shapiro: Yes, Your Honor, and to—

The Court: I do note it opens up by Mr. Wyckoff indicating who Mr. Rosenfeld is and Mr. Cooke voicing

an objection to his being present but going ahead in spite of him.

I'll receive it. It may have some evidentiary value. It's received, No. 8 for the plaintiff.

(Thereupon, Plaintiff's Identification Exhibit No. 8 was received and filed in evidence.)

By Mr. Shapiro:

Q. Mr. Cooke, would you examine this and tell me the point at which the discussion over the presence of the Court Reporter ended?

The Court: I think I may determine that mayself.

Mr. Shapiro: You certainly can, Your Honor, and—

The Court: I think that we don't need the witness to do that.

Mr. Shapiro: Well then, on that basis, I'll withdraw the question.

547 The Court: Do you want to limit your offer to those pages; is that it?

Mr. Shapiro: Yes, sir, that was the point.

The Court: Let's just understand that that is the portion of it and the actual negotiations of it are not what we are talking about. It's the first several pages there.

Mr. Shapiro: Actually, I think—I was going to develop it through the witness but I believe it's pages 1 through 4.

The Court: Yes, sir.

Mr. Shapiro: Of this copy.

The Court: Yes, sir.

Mr. Shapiro: I've seen another copy which was different.

By Mr. Shapiro:

Q. Now, Mr. Cooke, was anything said at this conference by the company about having insufficient staff to have—to use their former procedures for keeping track of the
548 negotiations? A. No, sir.

Q. What did the company say? A. Well, Mr. Wyckoff recalled two previous instances in which a Court

Reporter had been used, and neither of these meetings actually pertained to conferences with System Federation 69.

At one of the conferences to which he referred, the General Chairman of System Federation 69 was present at that meeting. That was in Mr. Ball's office herein Jacksonville.

Q. When was that? A. On a previous date. I don't recall the dates personally but—

Q. Would your recollection— A. He refers here to the two meetings of March 15 and May 10. It was one of those.

Q. And what did you respond to that? A. Well, I told Mr. Wyckoff that those were not conferences on initial wage notices or Section 6 notices.

Q. Why did you object to the presence of the Court Reporter? A. Well, we objected simply because it doesn't set up an atmosphere in which collective bargaining can be carried on. It makes everyone more—makes them try
harder to make a perfect record, rather than to try
549 to make progress in the negotiations.

Q. Did Mr. Wyckoff make any statement in this conference about the company's policy in the future concerning Court Reporters? A. Yes, sir. At the conclusion of our argument about the Court Reporter, he informed us that such sessions would be recorded by a Court Reporter from that date on.

Mr. Shapiro: I have no further questions of this witness.

The Court: Mr. Milledge?

Mr. Milledge: We have no questions, Your Honor.

The Court: Mr. Devaney?

Cross Examination

By Mr. Devaney:

Q. Mr. Cooke, when did you say the first meeting was that a Reporter was used that you attended? A. That was the meeting in Mr. Ball's office, either in March or May of 1963.

Q. I show you this. Does this refresh your recollection? This shows the meeting was held March 15. Does that appear to be the one you are referring to? (Indicating) A. Yes, sir, I believe this is; to my recollection, this is the first one that I attended that was recorded by a Court Reporter.

Mr. Devaney: Would you mark that, please.

The Clerk: U for identification.

The Court: Go ahead and mark it in evidence. Unless there is some objection you want to voice, we will let the Clerk go on and mark it in evidence now. This is represented to be the first one, Mr. Devaney, where a Reporter was used; is that right?

Mr. Devaney: The first one Mr. Cooke attended.

The Court: All right.

(Thereupon, the referenced document was received and filed in evidence as Defendants' Exhibit U.)

By Mr. Devaney:

Q. While he's looking at that, Mr. Howard, may I ask you this—I mean Mr. Cooke. I know you are not Mr. Howard I apologize.

You said that prior to 1963, you were not aware of a verbatim record being made; is that correct? A. That is correct. I was not aware if one was being made.

Q. And your presence at the negotiations as General Chairman goes back to 1959? A. That is correct. November 1st, 1959.

Q. Were you—and what you say about not being aware would apply to the entire period from 1959 to '63? A. Yes, that's correct.

Q. In other words, you simply do not know whether anyone representing the company did or did not make a stenographic record of the meetings? A. No, sir. I'm not aware that any such record was being made at any meeting I attended.

Q. At various meetings, did you act as spokesman, Mr. Cooke? A. Yes, sir, at meetings where System Federation 69 was concerned, I usually acted as spokesman.

Q. Now, at such times, does this keep you pretty well occupied in doing the speaking and looking at your papers and other documents? A. Yes, sir, that's right.

Q. You don't have much occasion to look around to see what your opposite members are writing or whether
552 they are not writing? A. Well, yes. I have looked around, Mr. Devaney, and I've seen them writing. I know that at least notes were being taken by various people, by both sides.

Q. Yes. But what I meant is, you don't have enough time to watch them to see whether they are missing words? A. No, sir. I do not, no, sir.

The Court: I think—I must say that it would be pretty hard in a conference room around a conference table and not know whether or not somebody is making verbatim notes. It's not like observing everything that goes on on a football field or out in the streets or something. A few people in the room; I don't see how—I understand that all he says is that he didn't see any. He might have been occupied with other things, but I think there's a conflict of testimony as to what occurred, is what it comes down to.

By Mr. Devaney:

Q. Now, do you—

The Court: I would say this for the record, something that hasn't come out; it may be in the record and may not be known to you, Mr. Devaney.

553 Mr. Sam Rosenfeld is a stenotype reporter. His taking notes of the proceeding might be a little more evident to everybody who would glance around than it would be to somebody sitting over there with a pad on the table in front of them. I say that because that may not be something that you are aware of.

Mr. Devaney: Thank you. No, I don't believe that was evidence on the record, Your Honor.

I don't believe I have any further questions of Mr. Cooke.

Mr. Shapiro: Mr. Devaney, may I have that exhibit you were examining? Do you want to use it?

Mr. Devaney: Yes. I'm sorry.

The Clerk: Let me mark it.

Mr. Devaney: This has been marked as U.

The Clerk: I didn't get it back to put it in evidence. (Marking instrument)

By Mr. Devaney:

554 Q. Do you wish to look at this further before I offer this as Defendants' Exhibit U, as being the transcript of the first meeting at which you attended where a Court Reporter was present? A. Yes, sir, I attended this meeting. I believe I testified that the other one was the first one in which System Federation 69 alone was involved in negotiations.

Q. I see. A. This was the entire group.

Q. This involved System Federation plus others? A. That's right, others.

Mr. Devaney: I offer this, Your Honor, as Defendants' Exhibit U.

The Clerk: It's in.

The Court: It's already received.

Mr. Devaney: Thank you.

No further questions.

Mr. Milledge: I think one more question ought to be asked, Your Honor.

555 The Court: All right.

Redirect Examination

By Mr. Milledge:

Q. The people on behalf of the carrier at these other negotiating sessions were all people actively participating in the negotiations; were they not?

In other words, did they ever have a person just sitting there, a lady or a man, doing no participating in the negotiation but just writing continuously? A. (No response)

Q. Did they ever have that situation? A. I've never observed anyone sitting and writing continuously, no.

Mr. Milledge: All right.

Mr. Shapiro: I have no further questions.

(Witness excused)

Mr. Shapiro: This concludes the rebuttal case for the Government, Your Honor.

The Court: Any surrebuttal?

556 Mr. Devaney: Yes, Your Honor. I would like to recall Mr. Wyckoff.

The Court: Come back.

R. W. Wyckoff,

having previously been sworn, was recalled as a witness on surrebuttal for the defendants and further testified as follows:

Direct Examination

By Mr. Devaney:

Q. Mr. Wyckoff, when you first joined the Florida East Coast as a member of the negotiating group, were you the only person who could and did take shorthand minutes for the company? A. No, there were usually two others besides myself who were qualified to take shorthand notes.

Q. Who were these others, Mr. Wyckoff? A. One was a young man by the name of John Douglas, and the other was Mr. Frank Atkinson, who could also take shorthand notes.

Q. Could either or both of these individuals take shorthand fast enough to make a verbatim record? A. I personally know that Mr. Douglas could because he recorded

frequent investigations before he went to St. Augustine.

557 Q. What do you mean by "investigations"? A. Well, they are on the form of a trial. A man appears under charge. He brings his evidence or the railroad brings the evidence first as to the rule infraction. The individual under charge presents his evidence to attempt to to exonerate himself.

Q. And you say Mr. Douglas had made records of these investigations? A. Both Mr. Douglas and myself.

Q. And at these investigations, you made a verbatim report? A. That's correct.

Q. Now, in these negotiations in which Mr. Howard was present, did you ever have occasion to observe and see whether he was writing in shorthand, Mr. Wyckoff? A. Whether Mr. Howard was writing shorthand?

Q. Yes. A. No. Usually I was taking the notes myself and, on occasion, Mr. Douglas did also; but I never paid particular attention to what Mr. Howard was writing. I knew that he was making notes. That was the most I could say.

Q. Could you see what he was writing from where you were sitting? A. No, I couldn't. The office was

558 so arranged that Mr. Howard or the negotiator from the union sat directly opposite Mr. Beals, who negotiated for the railway. And to the left was a separate table at which four individuals from the carrier were seated, four and on occasions five.

Q. Now, did this arrangement continue all the way up to 1960? A. Yes, as long as Mr. Beals was there, that arrangement continued.

Q. What was the arrangement after 1960? A. There was a separation made of the personnel functions and Mr. Holman was made Director of Personnel. He moved in a separate office but somewhat the same procedure was followed.

Q. Did you sit opposite Mr. Howard or in front of Mr.

Howard? A. Well, I believe it was in November, 1960, I was made Assistant Director of Personnel and I sat usually immediately adjacent to Mr. Holman. Now, there were other people on the staff at that time who could take shorthand notes and did take shorthand notes.

Q. Now, where—Did Mr. Howard always sit opposite you, right directly across the table from you, Mr. Wyckoff? A. You mean during the time Mr. Beals was negotiating?

Q. No, from 1960—after 1960? A. Well I sat off
559 to the left a little more. He didn't sit directly opposite me, no.

Q. This was a table with nothing between you two? Could he see what or whether you were writing on all occasions? A. Prior to 1960, I don't see how he could have because we kept the working agreements on the forepart of the table and usually that was stacked maybe a foot and a half high, so we would have them all present regardless of what might come up. And the balance of the table, we utilized for writing purposes. So how he could have seen what was going on is beyond my comprehension.

The Court: Look, let me ask you something. Let's have it one way or the other:

Either, as I understood you to contend before, you were in there openly taking notes where everybody could know it; now you were surrounded by papers and sneaking, taking notes by stealth.

Now, which is it?

The Witness: Your Honor, it wasn't a matter of taking notes by stealth.

The Court: Let's have it one way or the other.
560 The Witness: It wasn't a question of taking notes by stealth. We sat right out in the open.

The Court: You just said he couldn't tell what you were doing because you had papers stacked up a foot and a half high.

Now, which is it?

The Witness: Your Honor, he could see us writing, but

whether he could see us writing continuously or not, I can't say. I don't see how he could.

The Court: I just want your final version of this now and then we'll go ahead to something else.

The Witness: Your Honor, I'm trying to give it—

The Court: All right.

The Witness: —as honestly as I know how. I transcribed—I recorded the notes verbatim. When I transcribed them, I gave a resume form.

By Mr. Devaney:

561 Q. Now, were there occasions when there was some comment made about the company representatives taking these notes in shorthand, Mr. Wyckoff? A. There was a request, as I said before, on one or two occasions to my knowledge that they be furnished with a copy of the transcript.

Q. This was before—we are not talking about a Court Reporter now? A. That's right.

Q. Was there any comment on any occasion to indicate that they were aware that you were taking these notes in shorthand?

Mr. Milledge: I object. This is hearsay, if nothing else.

The Court: Go ahead and let him answer.

The Witness: Well, I know that the representatives were familiar with the fact that we were taking the notes in shorthand because frequently the negotiator would refer to us and ask what was said. We wouldn't read it back necessarily but we would tell it in a short version of what had transpired. So I know they were familiar with the fact that notes were being taken.

By Mr. Devaney:

562 Q. And this—there were requests by union representatives of the individuals making notes to clarify what had been said previously; is that correct? A. Either union representatives or Mr. Beals, who was negotiating for the railroad.

Q. Now, does Mr. Howard, or has Mr. Howard since 1954 occupied the same position at the table with respect to you on every negotiating session? A. Up to 1960, to the best of my recollection, yes.

Q. In other words, he always took a sort of pre-assigned position and you took a pre-assigned position? A. That's correct.

Mr. Wyckoff, I hand you this and ask you if this is a copy of the transcript made of the meeting you previously referred to between the company and various international union officials? A. Yes, it is; on July 24, 1963.

Mr. Devaney: I ask that this be marked as—

The Clerk: V.

(The referenced document was marked Defendants' Identification Exhibit V.)

(Mr. Devaney tendering instrument to Mr. Shapiro)

563 By Mr. Devaney:

Q. Mr. Wyckoff, are the investigations that you referred to earlier, are these the sort of cases that go to the Adjustment Board? A. Yes, they are quite frequently.

Q. And as I recall, you said that you did keep minutes of those meetings also? A. They are recorded and transcribed verbatim.

Q. And the transcription is verbatim as well as the taking of the notes? A. That's correct.

Q. Are those transcripts made available to the union? A. In the event the man under charge is disciplined, he is furnished with a copy of it.

Q. The individual? A. That's correct.

Q. What is the physical set-up, Mr. Wyckoff—

The Court: This you are talking about is making a record of his trial?

The Witness: That's correct.

The Court: For violation of rules or whatever it is?

564 The Witness: That's right.

The Court: The discipline hearing.

By Mr. Devaney:

Q. Now, what is the physical set-up at these hearings? Where are they held ordinarily? A. They are held—

Mr. Milledge: Excuse me. I object.

The Court: I suppose these people will concede that they make stenographic records of these disciplinary hearings and trials. It has nothing to do with this.

Let's move on.

Is that correct? Do you stipulate this?

Mr. Milledge: Yes. Yes, often with tape recorders and various devices.

Mr. Shapiro: The Government has no knowledge, Your Honor.

The Court: Sir?

565 Mr. Shapiro: The Government has no knowledge.

The Court: Well, I would suppose, just as a matter of common sense, I would guess they would.

Mr. Shapiro: I would expect so.

The Court: If he is fined or going to lose his job, they make a transcirpt of it. There may be an appeal. The same reason we are making a record in this proceeding.

Mr. Devaney: I offer this as Defendants' Exhibit—

The Court: It has nothing, I can see, to do with whether you have a Reporter present when you are negotiating rules, rates of pay and working conditions.

Mr. Devaney: Your Honor, it does not have any relationship as to whether we do or do not except in a physical sense, and as to who makes the same record, where the same individuals are used for both purposes. It was merely my purpose to show that the same physical condictions by and large existed at these meetings that existed in the negotiations.

566 Mr. Milledge: Of course, we can't stipulate to that.

The Court: No, I understand.

Mr. Devaney: It has been objected to and I haven't pursued it, Your Honor.

The last point is the offer of the document marked as Defendants' Exhibit V.

The Court: What it is?

The Clerk: V.

The Court: Let me see it.

(Clerk tendering instrument to the Court)

The Court: Tell me what it is you want me to take note of in here? This is about a hundred or more pages of reading material.

Mr. Devaney: Yes, this is the meeting that Mr. Wyckoff testified to between the company and the officials of the various international unions. It shows, Your Honor, that—

567 The Court: Well, is it mainly to show that there was a Reporter present and a transcript was made, or do you want me to take note of something said?

Mr. Devaney: That the Reporter was present, that these international officials did express an objection, but then proceeded with the meeting. That is the primary purpose of all the transcripts; I don't see that any of them have any other purpose than that.

Mr. Shapiro: Your Honor—

Mr. Milledge: We will stipulate to that.

Mr. Shapiro: Your Honor, if the exhibit is to be received, I think it's important that the objection by the union representatives and the entire discussion of whether or not there should be a Reporter should be specifically noted.

Now, I haven't had a chance to examine it fully but I think it runs from about page 1 through 10.

568 The Court: Well, I'll read those pages. If I'm expected to read everything in a hundred-page transcript, why, I would like to know it. Mark it in evidence, please.

(Thereupon, Defendants' Identification Exhibit V was received and filed in evidence.)

Cross Examination

By Mr. Milledge:

Q. Mr. Wyckoff, it's fair to say that if you had such a transcript of a negotiating session before 1963, that you would have brought it today; isn't that a fair assumption? A. No, it isn't necessarily a fair assumption.

Q. Well— A. There may be—

Q. There aren't any, are there? A. Sir?

Q. There aren't any, are there? Any transcriptions of any negotiating sessions prior to 1963? A. Now, I assume you have reference to my notes, my shorthand notes; is that correct?

Q. I have reference to a transcript. There aren't any transcripts, are there? A. There are resumes of what transpired during the course of the negotiating sessions, and there may be some of my shorthand notes in the file. I'm not in position to say now without reviewing the files.

569 You didn't bring any of your shorthand notes of these verbatim things either, did you? A. I don't have them with me, no.

Q. No; all right.

Mr. Shapiro: No further questions.

Mr. Devaney: Nothing further, Your Honor.

The Court: Come down.

(Witness excused)

The Court: Do you have any further evidence to offer?

Mr. Devaney: I'm sorry. We have no further evidence, Your Honor.

The Court: Both sides now announced closed?

Mr. Shapiro: Now closed, Your Honor.

Mr. Milledge: Yes, sir.

The Court: About how long do you gentlemen ex-
570 pect to take in the argument of this matter?

Mr. Shapiro: I think, Your Honor, that the Gov-

ernment should be able to present its main contentions in a half-hour, or perhaps less.

The Court: How long would you want, Mr. Devaney?

Mr. Devaney: Well, we will accomodate ourselves to whatever the Court feels is a reasonable time, Your Honor. We will try to be as brief in any event as possible. I would think that—

The Court: Something in the order of a half-hour?

Mr. Devaney: If the plaintiff wants thirty minutes, I would say we would limit—

The Court: I haven't asked Mr. Milledge and Mr. Rutledge. They may want some time, along with Mr. Shapiro's opening argument or in reply. They are here and they want to be heard.

Mr. Milledge: I think probably ten minutes, but
571 I think, at the outside, fifteen, probably ten.

The Court: Well, we have been in here since 9:30. Maybe you gentlemen would like to take about five or ten minutes rest.

We might be more comfortable if we took a brief rest-break at this point and be prepared to proceed in about ten minutes after the hour. That's seven or eight minutes.

(Short recess)

The Court: One suggestion I make is what you not spend too much time initially at least on the jurisdictional question, major v. minor disputes question, except to the extent that you think it may differ from the Trainmen case, in which I went through this matter a couple months ago.

Mr. Shapiro: Yes, Your Honor.

The Court: You may have to reply extensively on this point but I think, as far as the argument would parallel the argument in the Trainmen case, I think I have that pretty clearly in mind as to the ground on which
572 you would urge that there is jurisdiction and that it is a major as opposed to a minor dispute. That may save some time.

I have some tentative—I have necessarily reached some tentative conclusions about that, which may speed up your presentation of it. Mr. Devaney may raise some other questions in his argument that would require you to answer him on that point, but you just hit that quickly and lightly, I would think.

Argument by Mr. Shapiro

Mr. Shapiro: I can hit that very quickly and lightly, Your Honor, because it has been demonstrated by the answer and by the evidence in this record that the carrier at present is not operating under its so-called "Conditions of Employment." It's operating under the "Uniform Working Agreement" of September 24, 1963, and under the basic bargaining agreements for the operating crafts and classes, as amended by the notices of November 2nd, 1959.

The "Conditions of Employment" become relevant here primarily as a matter of the scope of relief in the
573 event relief is granted, because the carrier has indicated quite plainly in the testimony that if it is enjoined from operating under the "Uniform Working Agreement" or under the operating agreements as amended by the November 2nd, 1959 notice, it will simply go back to the "Conditions of Employment". So it's a question of how it relates to the scope of relief, but the immediate issues here are really confined to the Section 6 notices proposing abolition of the union shop and proposing the "Uniform Working Agreement". Those are very plainly major disputes.

Now, I don't think we have to dwell too long on what has been admitted in the complaint and answer; that July 31, 1963, the union shop agreements for the seventeen organizations listed in the complaint were proposed for cancellation; that meetings took place; that bargaining broke down over the Court Reporter issue; that the services of the Mediation Board were invoked within ten days after the last conference broke up on August 29, 1963; and that on September 9, 1963, the carrier, at the very outset of the

invocation of the Board's jurisdiction, announced that it considered the agreements to be cancelled; that it
574 refused to restore the status quo and that it informed the National Mediation Board in effect that it did not have any jurisdiction because the labor organizations were not in any position to invoke the Board's services.

Although the Board offered mediation by its letter of—I believe—well, by letter in October, the carrier replied on October 15 that it considered the agreements to be cancelled.

It has also been established that, as far as we can tell on the record now, the cancellation of the union shop agreement does not appear to apply to one organization, the American Train Dispatchers.

The carrier's position on the union shop matter is that there is nothing left to mediate; that, as its letter of October 15, 1963, indicates, Exhibit 9 to Mr. Thompson's affidavit, the only way that the union shop matter can be raised again is by a new Section 6 notice.

Now, with respect to the September 24, 1963 "Uniform Working Agreement", we have a similar history. The agreement was proposed. The parties met on October 28. I'm sorry, I think they met a little earlier than
575 that but, at any rate, the agreement was put into effect notwithstanding the fact that there had been a timely invocation of the Board's services; and the carrier again insisted that the Mediation Board was without jurisdiction. In fact, the answer which has been filed here has as one of its defenses that the Mediation Board has no jurisdiction in the circumstances.

I've already said that the September 24 notices are what the carrier states to be in effect now.

Now, we have had a great deal of trouble with these words "in effect", but at this point, it seems to be fairly plain that, whatever the carrier means by "in effect", whether it means what it's actually operating under or whether it means what's on a piece of paper but dormant,

the September 24 "Uniform Working Agreement" is in effect for the non-operating organizations and for the International Association of Railway Employees.

For the operating organizations, it's the basic agreements as amended by the November 2nd, 1949, notices by the ops.

Since the testimony is that the carrier would revert to the "Conditions of Employment" and since the testi-
576 mony has also shown that the "Conditions of Employment" of September 1, 1963, are substantially the same as the "Uniform Working Agreement", the "Conditions of Employment" become relevant to the case insofar as we are concerned with the scope of the decree.

If the carrier is required to restore the status quo, it would simply go back to these—as I've already said, to these "Conditions of Employment", thereby achieving indirectly what it cannot achieve directly through a Section 6 notice, since it's already established that the conditions are substatntially the same as the "Uniform Working Agreement", with a few differences relatively minor in nature as far as the actual rates of pay, rules and working conditions—the real heart conditions, pay, seniority, hours of work, holidays and the like. The things that form the heart of the collective bargaining agreements are the same as the "Conditions of Employment" and the same in the "Uniform Working Agreement".

Now, this carrier has never attempted, we believe, and the evidence we believe will show this, to comply with the requirements of Section 6 of the Railway Labor Act
577 and Section 2, Seventh of the Act, insofar as its "Conditions of Employment" are concerned. It has used these "Conditions of Employment" as a means of evading the requirements of the Act and, indeed, evading the requirements of Public Law 88-108 and evading the ruling by Judge Youngdahl in April of last year in the Section 10 case which was brought against the carrier. Each time it has been told to do something to restore the

status quo, the only thing that has happened is that it has gone back to these "Conditions of Employment". In fact, it's plain that the only thing it ever did operate under were the "Conditions of Employment" and this was the situation until it finally put into effect the "Uniform Working Agreement"; and finally after a great deal of hemming and hawing, decided that it preferred the December 2nd, 1959 arrangement for its operating organizations to its former proposal of September 25, 1963.

Your Honor will recall that that September 25, '63 notice was served on the operating organizations and that it's nothing more than the "Conditions of Employment" transformed into permanent agreement for the operating organizations.

578 The carrier abandoned that proposal and it seems to have done so categorically on March 9, 1963, after Your Honor's decision in *Brotherhood of Railway Trainmen* v. the *Florida East Coast Railway Company.*

At one time, this carrier actually seemed to have in effect two sets of rates of pay, rules and working conditions for its operating employees.

On February 25, 1963, you will recall from Mr. Wyckoff's testimony that they had written a letter informing the carrier that—informing the labor organizations that the September 25 notice was in effect, except as modified by Your Honor's decree in No. 260; that the November 2nd, 1959 notices were in effect. And apparently the carrier was at that time working under the "Conditions of Employment".

What we have here is a proclivity to twist and turn back and forth among the several possibilities that the carrier set up for itself in an effort to avoid the requirements of the Railway Labor Act and to shake itself free from the collective bargaining agreements, which it finds unsatisfactory.

579 Now, the carrier, I think the evidence will show, cannot be justified in its contention that all it has done was put upon it by the strike in January 1963.

This carrier never attempted to comply with the bargaining agreements that it had. It never initiated a program intended to bring it into capability of complying with those bargaining agreements.

Mr. Thornton testified that it began a long-range permanent program in February, 1963, to build up its personnel staff when it resumed operation. And this long-range program was really based on what became the "Conditions of Employment".

Now, the program was aimed at getting rid of the rates of pay, rules and working conditions that the carrier considered undesirable from the standpoint of its operation.

There's nothing wrong with trying to improve operations and increase efficiency, but there is something wrong with doing it in a manner not provided in the Act.

The rules for conducting labor affairs in the railroad industry are laid down by law and are laid down by law in an effort to minimize controversies. This carrier is not interested in that law.

580 Now, what are the violations?

Well, it's nothing more than Section 6 of the Railway Labor Act, which provides that the status quo will be maintained while mediation effort is being made on notices served thereunder; and Section 2, Seventh of the Railway Labor Act, which forbids the carrier to change rates of pay, rules and working conditions as embodied in agreements, except in accordance with the procedures of Section 6.

The carrier suggests that it has a right to resort to self-help with respect to the union shop agreements and with respect to the "Uniform Working Agreement", because the conferences broke down.

I think this flies in the face of the express language of the Railway Labor Act. Section 2, Fifth of the Act expressly provides that where conferences are refused, the Mediation Board may put itself in touch with the parties and that thereafter they will follow the procedure of Section 6.

I refer specifically to—it would be 45 U.S.C. 15—

The Court: 2, Fifth?

581 Mr. Shapiro: 2, Third.

The Court: 2, Fifth, isn't it?

Mr. Shapiro: 2, Fifth, yes, Your Honor. Did I say 2, Fifth? I should have said—

The Court: 2, Third.

Mr. Shapiro: I should have said it's Section 155.

The Court: 155, Third; is that right?

Mr. Shapiro: Yes. Your Honor, it's actually Section 155, First (b), and I apologize to Your Honor for the delay.

The actual language is that the parties, or either party to a dispute beween an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases; and (b) provides:

"Any other dispute not referrable to the Na-
582 tional Railroad Adjustment Board and not adjusted in conferences between the parties or where conferences are refused."

And it's that last phrase, that last five-word phrase, which demonstrates the inadequacy of the suggestion, that simply by getting into a dispute over how negotiations are going to be conducted, a carrier can resort to self-help without concerning himself with mediation and the Mediation Board's functions.

The whole purpose of the Mediation Board is to get together between parties who won't get together and to bring them by some means or other into negotiations where they can work something out. This is done by a dozen different techniques, as I think I mentioned yesterday; dealing with the parties separately, dealing with them jointly, trying to bring them to an agreement.

Now, this is very plainly a major dispute, as far as the Section 6 notices are concerned, so I won't ever discuss the major-minor aspect of it.

There's clear power under the Railway Labor Act for

this Court to vindicate the processes of the Act. The United States very plainly has standing in a case
583 where it's necessary that the functions of the Mediation Board be protected, to come in and make it possible for the Board to carry out its statutory duty.

This was done by Judge Youngdahl in a case under Section 10.

It's a clear implication of cases like *In re Debs,* which we cited in our memorandum, in which a major strike was actually enjoined at suit of the United States. Note, the United States was not the employer or party to the strike, the major railway strike.

And I think it's made clear by the case which we cited in our memorandum concerning the City of Jackson and its refusal to comply with the Interstate Commerce Act. It was *United States* v. *City of Jackson,* 318 F. (2d) 1, with particular reference to the language at pages 11 through 16, decided by the Fifth Circuit in 1963, and rehearing denied at 320 F. (2nd) 870.

I might say that in that case the Judges of the Court of Appeals based the standing of the United States on different grounds. One ground was statutory but one of the Judges wrote an extensive opinion demonstrating
584 why the United States would have standing apart from the statute, and it's as to that to which we refer.

Now, the Norris-LaGuardia Act has been raised as an obstacle here. I think, in the light of Your Honor's decision in the Trainmen case, a serious contention that the Norris-LaGuardia Act is an obstacle cannot be raised in this case. This is very plainly a major dispute in which the carrier is charged with not comply with the requirements of the Railway Labor Act.

It has been established since *Virginia Railway* v. *System Federation,* 300 U.S., that where a carrier is charged with violating the Railway Labor Act, the Norris-LaGuardia Act is not a bar to jurisdiction. This is most clearly demonstrated in the decision of the Supreme Court in United

States—I'm sorry in *Trainmen* v. *Chicago R&IR Company*, at 353 U.S. 30. This is usually known as the Chicago River case and it is the decision in which the Supreme Court demonstrated how the Norris-LaGuardia Act must be accommodated to the requirements of the Railway Labor Act. The opinion, at pages 40 through 42, makes this particularly clear.

585 Now, that case involved a minor dispute, a strike over a grievance, which the Supreme Court said had to be processed through the National Railway Adjustment Board. Well, a fortiori, if you have to go to the National Railway Adjustment Board and exhaust those procedures before you can resort to self-help, then it would seem to follow that in a major dispute such as this "Uniform Working Agreement" dispute or the union shop dispute, that the carrier cannot restort to self-help until after the processes of Section 6 are exhausted.

Now, I think this is most clearly demonstrated in *Order of Railway Telegraphers*, at 362 U.S. Now, the correct citation of that, I'm informed, is 362, 330.

Now, that case involved a proposal by carrier to make changes in the number of stations that it was operating. And the carrier said that this is not a matter that is subject to the Railway Labor Act and we are not going to negotiate about it. And the union claimed that they had to negotiate about it, and threatened to go out on strike. Now, the matter reached the Supreme Court after the Lower Court—

586 The Court: What was the defendant railroad, the Chicago Northwestern or Chicago Milwaukee? Which one?

Mr. Shapiro: Chicago Northwestern.

The Court: Chicago Northwestern.

Mr. Shapiro: The case reached the Supreme Court after a Lower Court had enjoined the strike, but only enjoined it pendente lite, holding on the merits that it had no jurisdiction.

The Court of Appeals in that case said that the Lower Court had jurisdiction and should enjoin the strike permanently.

The Supreme Court said:

"No, this is a major dispute and the Norris-LaGuardia Act bars an injunction."

Now, that was the majority opinion.

I went through the whole opinion and read Justice Whitaker's dissent. As it happened in that case, Justice Whitaker's dissent lays out all of the facts and Jus-
587 tice Black's majority opinion simply lays out the general conclusions that the Court had reached. In there, I found that in the case mediation had been invoked. The National Mediation Board's services had been called upon, the Board stepped in and it made a mediation effort. It actually lasted, oh, about five months. It was about five months of mediatory effort, if you take the time from the time the Board's jurisdiction was invoked until the Board finally gave up and proffered arbitration to the parties in June of 1960. And it was then, at that time, that the union went out on strike.

The point again—the point of the Railway Telegraphers case is that Norris-LaGuardia Act—the Norris-LaGuardia Act does not apply prior to the time that the processes of the Railway Labor Act are exhausted; or, turning the coin the other way, I stated it as we view it, but, turning the coin in terms of the exact hearing and holding of the case, after the processes of the Railway Labor Act are exhausted, the Norris-LaGuardia Act will bar an injunction against self-help; but after the processes of the Railway Labor Act are exhausted.

Now, the particular facts that I refer to appear in
588 Justice Whitaker's dissent, at pages 349 through 350.

I don't think that the Norris-LaGuardia Act can stand as an obstacle in this case.

The further defense is raised that the National Mediation Board has failed to mediate in the circumstances, but, as I have stated to Your Honor, this is a case in which at the very outset of the dispute over the union shop agreement, over the "Uniform Working Agreement", at the very outset of the time when the National Mediation Board is taking jurisdiction of the case, the carrier is putting those very changes into effect; and by doing this it is defeating the conditions of stability which Congress provided for when it required that there by a maintenance of the status quo while the Mediation Board makes its effort.

Now, because the carrier has done this, the Mediation Board is not obliged to go ahead and mediate until the carrier gets back into compliance with the Act. That's the purpose of this action.

There have been other defenses raised. One is that the labor organizations have disclaimed their representative status. Now, I am a little puzzled by this since I
589 know of nothing in this record to support the statement that these labor organizations have disclaimed their representative status. Under the Railway Labor Act, they represent all of the craft or class, whether the crafts or classes are members—whether the employees in the craft or class are members of the union or not.

Now, these labor organizations have a union shop agreement and that union shop agreement remains in force notwithstanding the fact that there is a strike going on.

There was some argument yesterday which indicated it was the carrier's position that the union shop agreement just became—was cancelled by itself, but the purpose of this action is to compel the carrier to withdraw its own cancellation of that union shop agreement.

Part of the carrier's argument here appears to be that because the union is on strike or because the organizations that are not on strike have members who do not cross the picket lines of those who are on strike, that the union shop agreement becomes somehow nullified. The consequence

of this would be, of course, that every time there was a strike by an organization with a union shop agree-
590 ment over any issue, the union shop agreement would be cancelled.

Now, this is just absurd. The union shop agreement survives until it's cancelled in accordance with the processes of the Act. How the parties work under the agreement may be something else again, but the agreement survives and the cancellation which has been attempted here as a prospective matter is illegal and should be enjoined.

We've already mentioned the National Railroad Adjustment Board problem, pointing out that this is basically a major dispute; but if the carrier reverts to the "Conditions of Employment", it is going to be simply trying to put into effect indirectly what it cannot put into effect without complying with the procedures of Section 6 of the Railway Labor Act; in short, using the "Conditions of Employment" to evade the requirements of Section 6.

Now, there has been some reference recently to the very recent decision of the Court of Appeals in *Aaxico Airlines, Inc.* v. *Air Line Pilots Association.*

The Court: Aaxico Airlines, isn't it?

591 Mr. Shapiro: Yes, sir, decided, I think, April 15th.

Well, Your Honor, the Aaxico case, I don't think has any application to this case. In the first place, in Aaxico, we didn't have an attempt to implement through Section 6 notices the same conditions that have been raised here as temporary "Conditions of Employment".

Secondly, in Aaxico, at least it could be argued that the question of whether or not the contract survived under its terms or the contract involved, the question of whether or not the contract survived arguably could be said to depend upon the particular language of that contract. But in this case, the carrier has told us that its "Conditions of Employment" have no effect on the contract. So that what it's really saying is that it's the Railway Labor Act that

gives it some special right to evade, avoid the rates of pay, rules and working conditions as embodied in that contract and substitute on a wholesale basis a complete revision of the rates of pay, rules and working conditions for the duration of the strike emergency.

Now, it isn't the contract that's in issue. Its the
592 statute. And that is certainly not a question of the National Railroad Adjustment Board.

I should mention also the decision of the Second Circuit in *Manning* v. *American Airlines*, which also involved an attempt by a carrier to change rates of pay, rules and working conditions without going through the processes of the Act. In that case, it was a check-off arrangement which the carrier unilaterally terminated. The Second Circuit said this was very plainly a matter which belonged under Section 6, it was a major dispute, and it affirmed an injunction notwithstanding the carrier's argument that it was a minor dispute and that the Norris-LaGuardia Act somehow barred jurisdiction. Now—

The Court: Do you have the cite of Manning?

Mr. Shapiro: 329 F.(2nd) 32.

The Court: Thank you. I assume it's in your brief?

Mr. Shapiro: It's in our brief, but I think in our brief it's still cited to the Labor Relations Reference Man-
593 ual. It was only reported a few weeks ago under the Federal (2nd).

Now, there's one final statement I would like to make in response to a representation made by Mr. Devaney during an altercation over the admission of some evidence.

Mr. Devaney stated that, in the case last December involving Public Law 88-108, he had told me about the "Conditions of Employment" and that if I didn't ask Mr. Wyckoff further questions about them, it was not Mr. Wyckoff's fault. I have no recollection of having been told about the "Conditions of Employment" by Mr. Devaney. I know that there is nothing in the record in No. 260 about them and I'm also prepared

to represent to the Court that the first information we had in the Department of Justice about the "Conditions of Employment" of September 1, 1963, was after Your Honor's decision in the Trainmen case on March 2nd. It was that information which led to a general view of the problems of the Florida East Coast Railroad and Ultimately to the direction that this action be filed.

There is a final matter. A good part of the rebuttal case by the carrier and part of our case this morning was
594 addressed to the question of Court Reporters in labor negotiations. Now, I think Your Honor will recall that I had objected on the ground, at the time this issue came up, I had objected on the ground that I didn't consider it relevant or material to the case.

I want to reiterate that I haven't abandoned that position, that I wanted to present evidence to rebut it in case my contention here, which I'm about to make, is rejected.

Now, the relief we seek here is primarily to compel the carrier to restore the status quo ante its notices involving the union shop agreement and the "Uniform Working Agreement", and to prevent it from avoiding a direction that it do this by resorting to the "Conditions of Employment" of September 1, 1963.

We also ask as a general prayer that the carrier be directed to bargain in good faith. The theory that the carrier has not bargained in good faith is based on the fact that the carrier put its rates of pay, rules and working conditions into effect without waiting for the processes of the Act, without trying to make an effort to comply
595 with the processes of the Act. That is the real violation.

Now, I think we developed in the testimony this morning that one could say that the labor organizations refused to bargain in the presence of the Court Reporter, or one could turn it around and say that the carrier refused to bargain in the absence of a Court Reporter. Court Reporters aren't customary in labor negotiations, for the reasons

that Your Honor has heard this morning. They inject an awareness of words, a concern with formality. It defeats the whole effort of trying to reach agreement.

Again, I emphasize that in labor negotiations, you've got strong-willed people on both sides taking a strong position and sometimes using strong language. They have to work in an atmosphere of informality. Now, the fact that someone has a reporter present doesn't automatically make their insistence on the reporter a violation of the law. This is largely a matter of circumstances. But in most circumstances it may well be evidence of bad faith, as the National Labor Relations Board has held. It isn't of itself a violation, but it may be evidence of an intent or an attitude to bring about a violation.

596 Now, no decree that Your Honor has to issue at this time need be directed to this issue of whether a reporter should be present or not. It is conceivable that further difficulties could arise over this Court Reporter issue but it would be hoped that, with an honest mediation effort and genuine, sincere effort on both sides to comply with their statutory duty to exert every effort to reach agreement, that this could be avoided because the Court Reporter, after all, is only a matter of procedure and labor negotiations can be carried on effectively without one.

If everybody does meet and try to do what the statute says they must do, and the express words are, in Section 2, Second, I believe it is—152 Second—that they exert every reasonable effort to make and maintain agreements. I'm sorry, that was Section 2, First.

Section 2, Second is that all disputes shall be considered and, if possible, decided in conference.

Those two Sections, taken togetehr, state the duty to bargain in good faith, to really try, to meet together

597 at reasonable times with an intent of making every effort to reach agreement.

Now, that's as much as is being asked for here, to give

the Mediation Board a chance to try and work with these people. I don't know whether they will succeed.

It may well be that at the end of all of this, the carrier may well end up with the right to put its "Uniform Working Agreement" into effect.

The Government's interest here is not in what is proposed by the carrier or what is proposed by the union, as such. The Government is concerned with bringing the parties together so that they can try and reach an agreement. What kind of agreement they reach is for them to decide. That's as far as the Railway Labor Act takes the Mediation Board, or takes the Government in these disputes. And what we ask is that the carrier be required to restore the conditions under which mediation can take place and that the processes of the Railway Labor Act be applied to it.

The Court: Do you want to go ahead now?

598 Mr. Rutledge: Your Honor, would it be appropriate for us to reserve just a few minutes at the conclusion?

The Court: I think so, if that's agreeable with Mr. Devaney.

Mr. Devaney: You mean that they be in the rebuttal position, Your Honor?

The Court: Well, I think— suppose, if you differ in any particular from the Government's view, you go ahead and state it now so that—

Mr. Rutledge: We don't differ with anything that the Government's view, either as to the law or the facts in this case.

Argument by Mr. Devaney:

Mr. Devaney: Your Honor, to begin with, I would like to reiterate at the outset our Motion to Stay any decision in this case pending the decision of the Fifth Circuit in the 21356 case. And as we set forth in the Motion to Stay the entire proceeding, the same issues are involved and we feel

for those reasons that for the Court to issue here a
599 temporary restraining order is actually within the terms of the order issued by the Court of Appeals on March 14th, staying the proceeding, namely, that any order such as is requested here—and Mr. Shapiro says what he really wants is an order requiring that we may operate during the period of the strike only under the terms of the agreement that was in effect before the strike began—and, as the testimony shows very clearly, this can have only one effect on the operation of the Florida East Coast and that is in reduction of its service.

Now, a 50% reduction in service would be felt not only by the railroad but by the public that we serve. And this issue having been present, the same issue of irreparable harm having been present in the 64-40 case, and the Court of Appeals having granted this stay pending its decision in 21356, we again urge that that should be considered in this case.

Now, before reaching the actual facts in this case, I would like to direct attention, first, to some portions of our memorandum in support of our Motion to Dismiss that relate to the standing of the Government to maintain this action at all.

600 I think that the complaint and the testimony here makes it very clear that the real dispute is between the various organizations and the company.

Now, in this regard, while there may well be disagreement as to who struck John, I don't think there's any doubt that the unions refused to bargain. All the testimony indicates this flat refusal to meet. We say this is a flat violation of the obligation under the Act to meet and confer.

We believe that the various cases, beginning with the *Virginia Railway* v. *System Federation* through *Burley*, and the most recent one is *IAM* v. *Central Airlines*, all recognize that the duty to bargain is an actual duty and it is not a perfunctory duty that either party can simply close the door and asy, "We won't bargain." The

Act never contemplated that. And for the union in effect to say, "We won't bargain, we won't play", just is not compliance with their obligation under the Act. So that this is a dispute between the Florida East Coast and the unions.

It's not a question of Florida East Coast having tried to evade the provisions of the Act at all.

601 Now, the complaint seems to be based on the assertion that the United States has standing because of some involvement with commerce, and yet the facts all indicate here, and I don't believe any contrary finding is possible, that there is no present interruption to commerce or any threatened interruption to commerce. Quite the contrary. Florida East Coast is operating. So that reliance upon this interruption to commerce is not well taken.

Now, by the same token, the United States has no proprietary interest in this case.

Now, they have cited in connection with the disruption of interstate commerce *In re Debs.* Now, that is to be found at 158 U.S. 564. It was decided in 1895.

Now, there is a later case which they cite, *United States* v. *Brotherhood of Railroad Trainmen,* 96 F. Supp. 428, Northern District of Illinois, in 1951.

Now, the basic holding in *In re Debs,* I believe has been squarely overruled by the Supreme Court and has certainly been overcome by the passage of the Norris-LaGuardia Act of 1932.

In *United States* v. *United Mine Workers of*
602 *America,* which is at 330 U.S. 258, at pages 277 through 278, the Supreme Court had this to say:

"In the debates in both Houses of Congress, numerous references were made to previous instances in which the United States had resorted to the injunctive process in labor disputes between private employers and private employees where some public interest was thought to be involved. These instances were offered as illustra-

tions of the abuses flowing from the use of injunctions in labor disputes and the desirability of placing a limitation thereon. The frequency of these references and the attention directed to their subject matter are compelling circumstances. We agree that they indicate that Congress in passing the Act did not intend to permit the United States to continue to intervene by injunction in purely private labor disputes."

Now, the case of the *City of Jackson* is itself an
603 unusual case and represented a very broad holding that the commerce clause prohibits obstruction to interstate commerce and that the United States has standing to sue for injunctive relief to enforce the Commerce clauses.

Now, here there isn't any possible allegation of the interruption of interstate commerce. And even though the City of Jackson was not based upon any threat or peril to interstate commerce but a finding that a present obstruction of interstate commerce existed, the contention that this can be further broadened here to say that the United States has standing under the commerce clause in any case by merely alleging that there may at some time be some relation to commerce does not seem well taken to me.

Now, in the second place, we pointed out that the United States is not the true party at interest. We think that this was demonstrated by the petition of intervention on behalf of the eleven unions; and that, because the United States was not the real party of interest, that it had no standing to maintain this case.

Now, all of these matters are reviewed at some
604 length in the memorandum in support of our Motion to Dismiss. And I'm not going to pursue them in great detail at this time.

Now, reverting to the complaint a moment, the complaint here is actually divided into three counts, the first one being the essential allegation appearing in paragraph 11, that the Florida East Coast breached its duty by failing

to make every reasonable effort to make and maintain agreements.

Now, this has no basis whatever in this record.

Now, a lot of remarks have been made as to the company's intention as to what was placed into effect and what was modified. We've never made any secret of our position. When the strike occurred on the Florida East Coast, the testimony here very clearly indicates there were no employees, no scope employees, left to perform the work. The only people available were the supervisory employees.

Now, when we resumed operations on February the 3rd, there wasn't any possible doubt that when we used these supervisory employees that we did so in violation, if you will, of the collective bargaining agreements. And when we operated the crews from Jacksonville to Miami and back and when the same crew did the switching,
605 the road work and the terminal switching at its destination, there isn't any doubt that this was not in conformance with the prior agreements. The agreements narrowly restricted the work to very strict craft lines. We did not have the employees to observe those craft lines. And it's perfectly clear that from February 3rd, we had no choice if we were to operate at all but to use the employees who were available in whatever manner necessary to perform this work.

We have said consistently that by doing this we did not change any agreement that existed before the strike.

Now, why the difference? Is there any difference between this? We believe that there is a very important difference between saying that we have changed those agreements and saying that we were forced to operate during the period of the strike with the manpower we had, even though it meant deviating from those agreements.

We say, as we developed before Your Honor before at some length, that the strike itself created this emergency condition and it had the effect of suspending the agreements.

606 Now, Mr. Shapiro says that we have alleged that it cancelled the agreements. We have never made

any such allegation. We do not believe that that was the effect at all. And the fact that we gave Section 6 notices later is certainly moot testimony that we did not take any such position at any time.

We do say that the strike condition permitted us to operate in the manner that we could with the personnel we had available.

We also say that this is not an instance in which the carrier sought to change or to bring about any change in the agreements.

Now, this is not a new idea. It was considered at some length by the Seventh Circuit Court of Appeals in the *Chicago Midlands* case. And that was the case in which there was also a strike by the Brotherhood of Railroad Trainmen, and the contention was that when the carrier itself took action that it was seeking to change conditions. The Seventh Circuit said, if I may quote briefly, it said this, and I'm quoting from 315 F. (2d) 771, and it is at page 775. The Court said:

"But defendants overlooked the fact that it was
607 they who acted to disturb the status quo by inducing concerted action by plaintiff's employees to honor the picket lines, thus defendants' reliance upon Rutland Railway Corporation v. Brotherhood of Locomotive Engineers is misplaced. In Rutland, the railroad altered the status quo by reducing and rescheduling freight runs so as to eliminate the number of jobs and changed home terminals of some of the trainmen whose jobs were not eliminated. In Rutland the disagreement was characterized as being whether the railroad has the unilateral right to make those changes without negotiating about them with the Brotherhoods. It was the failure of the railroad taking such action to first confer with the Brotherhoods, which the Court there found required the application of the clean-hands provision of the Norris-LaGuardia

Act. In the instant case, the defendants unilaterally
608 induced concerted action resulting in a work stoppage."

Now, this merely emphasizes the difference between a carrier which, like Southern in the *Southern Railway* case or the like the Airline in the *Manning* case—if you would like the citations, I believe I have the Southern; do you have that, Your Honor?

The Court: I have that and I have the Manning case.

Mr. Devaney: Now, in the Southern case, as Your Honor will recall, this was an instance where the railroad undertook to change the long-established practice of having a fireman on every train. They contended that the existing agreement didn't require the hiring of additional firemen. They merely assigned firemen from their firemen roster until all the names were exhausted and then they didn't have to have any more firemen.

Now, that clearly was a case where the carrier sought to change. They were not faced with any action by the union that changed the status quo which gave them the right to react to it.

Manning was the same kind of case. That was the
609 case, as Your Honor may remember, in which the Airline had a term union security agreement—I'm not positive whether it was check-off or union shop, but it was union security agreement.

The Court: Check-off.

Mr. Devaney: For a period of time.

The Court: Wasn't that what happened in Manning? They abolished or abrogated a check-off agreement?

Mr. Shapiro: Yes, Your Honor.

Mr. Devaney: Now—

The Court: Without Section 6 proceedings.

Mr. Devaney: Yes, when the contract expired, the rail—the airline said, and took the position that, "Look, the contract has now expired; we don't have to give Section 6 notice." Now, the Court held that once it had become a

condition, that the carrier couldn't change it, couldn't abrogate it without giving the Section 6 notice.

610 Now, we think that there isn't any conceivable doubt here, where the strike has occurred, that the strike itself has changed the conditions. It changed the conditions by removing totally the availability of scope employees. They simply weren't there to perform the work. And in order to react to this, we merely say that during the period of the strike that this was an emergency condition and we had the right to operate with the manpower we had available.

Now, this, Your Honor, was the—this was the condition under which we were forced to operate on February 3rd. And on September the 1st, when we reduced these provisions to writing, this did not change the contracts that were in force and effect. And as we have said over and over again, at any time that any of the unions had terminated their strike and we had the manpower available, their original agreements would have applied and the conditions created by this emergency would have ceased to exist. They were justified only because of the emergency conditions in the emergency, and there is no longer any right to work in that manner.

611 Now again, this is not a unique position that Florida East Coast has come up with. There have been a considerable number of cases, as we've pointed out, which have gone to the Railroad Adjustment Board, in which this kind of a problem was involved, namely, what does a carrier do when faced with a strike or a refusal to cross a picket line? What can it do to perform the work? And everyone of the cases that we called to Your Honor's attention—in the Brotherhood of Railroad Trainmen case, were instances in which the carrier had had the work performed in a manner different from that required by the agreement or by some employee other than the person who would regularly have performed it, and it paid in a different manner. And in each of those cases,

the Adjustment Board held that the emergency created by the strike justified the carrier's performing this work.

Now, if you would like those citations again, Your Honor, I'll be glad to give them to you. Some of them which we've called to your attention before; now, these were *Brotherhood of Railroad Trainmen* v. *Kentucky and Indiana Terminal Railway Company.* This was the Adjustment Board First Division Award No. 17,055,
612 1955; *Brotherhood of Railway and Steamship Clerks* in *Macon, Dublin and Savanah Railroad,* Adjustment Board Third Division, Award No. 10,197, 1961; *Brotherhood of Maintenance of Way* and *St. Louis Southwestern Railway Company,* Adjustment Board Third Division, Award No. 5042, 1950; *Brotherhood of Maintenance of Way* and *Missouri and Pacific Railway Company,* Third Division, Award No. 5074, 1950; *Order of Railway Conductors* and *Boston and Main Railroad,* First Division, Award No. 13,341, in 1950.

Now, those cases, as I say, Your Honor, all involved instances of a refusal to work by the scope employees and performance of the work during this emergency period. And as they stated in the *Macon, Dublin* and *Savannah* case, it said that:

"The Board finds that due to the trainmen's strike, that an emergency condition existed which justified the action taken by the carrier during the period of the claim."

Now, we have never contended that we can cite these cases and say that this is a decision in which the Adjustment Board has had occasion to pass upon the operation of the railroad during a period equivalent to
613 the period operated by the Florida East Coast, but we do say that everyone of those cases clearly recognize that when a union engages in a strike which it is, in this case it's certainly authorized to do, when it does that the carrier is entitled to react to this emergency condition and perform the work with the personnel that it does have available.

Indeed, as we have pointed out to Your Honor before, this is the only way in which the right which is conceded on all sides in this case of the carrier to operate during the period of the strike can have any conceivable importance because, as the testimony here clearly indicates, there was no other way for the railroad to operate, and it cannot operate any other way today without reducing its service by approximately 50%.

Now, the second part, the (b) part of their complaint, they say that we have failed to consider all disputes with our employees in conference with their representatives.

Now, if one thing is clear from this record, Your Honor, we think it is that this is an absurd assertion. To
614 begin with, Florida East Coast gave the Section 6 notice of July 31st with regard to the union shop agreement, and it scheduled a meeting and, at the time and place scheduled for the meeting, the union refused to negotiate.

Now, the same thing occurred on the "Uniform Working Agreement" because we gave the Section 6 notice on September the 24th. Again, the meeting was scheduled and there was a refusal to bargain.

There isn't the slightest doubt that it has been the long-established practice of Florida East Coast to make stenographic reports of negotiations. Now, we did it from 1954 forward. A Court Reporter was not used until the strike limitation on personnel made it mandatory that we turn to a Court Reporter or to a recording device to take down these minutes. Now—

The Court: Excuse me for smiling.

Mr. Devaney: Yes, I understand.

Now, I take it that the only justification that I see from the union's comment to this is that they have no objection to having a record made, if it isn't an accurate record, or
615 else they are saying that "We don't mind if you did it in 1937 with a pencil. You've got to continue to do it. You can't have a stenotypist."

About all I can say is that this is typical to their reaction on most proposed changes, but I think that the way it is done, Your Honor, can have no conceivable bearing on whether the carrier acted properly or not. This was a long-established practice of the Florida East Coast. It was not one put into effect or brought to the fore for this proceeding by any stretch of the imagination, but was seized upon by the unions as a purported justification of what in truth was a flat refusal on their part to bargain. They had no intention to bargain. The question had never been raised before.

You will note from these transcripts there is no reason stated that would justify this. There's no situation here where there has been any interference with the collective bargaining process. Mr. Shapiro has said over and over that confidentiality is required on many of these phases. This s not a matter that really affects the confidentiality of disclosures made by the union to a Mediator, by a company to a Mediator. There is no problem here in
616 trying to record what the union has told the Mediator. All we've asked for, all we've said that we believe is a proper procedure here, we've insisted upon, is, when we meet together in this negotiation, we want a record, we want an accurate record for our own knowledge as to what has occurred. We don't have infallible memories.

We do not find any thing in this that is contrary to any provision of the Act.

There was one case which Mr. Shapiro has mentioned which is the *Read and Prince* case, in which the National Labor Relations Board made the finding in that case that this was further evidence of the company's bad faith. Now, this was the case where there were innumerable unfair labor practices. The Read and Prince Board decision may be found in 96 N.L.R.B., page 850. It is 28 L.R.R.M., page 1610.

Now, this order was enforced by the Fourth Circuit. I'm sorry, by the First Circuit, at 205 Fed. (2nd), page 131. This First Circuit was 1953 and certiorari was denied at 346 U.S. 887, in 1953.

Now, while the Board, the N.L.R.B., had found
617 that this was evidence, further evidence of the company's bad faith, the First Circuit did not agree with the Board. The First Circuit said:

"We are not inclined to agree with the Board that the company's insistence over the union's strenuous objection of having a stenotypist present at all the bargaining meetings to take down a verbatim transcript of the proceedings was evidence of the company's bad faith."

That's at 205 Fed. (2nd) 139.

Now, so far as—

The Court: That's 205?

Mr. Devaney: 205.

The Court: Thank you.

Mr. Devaney: Now, so far as I have been able to ascertain, so far as any authority has been cited by the Government at any point or by the unions at any point, that is the only case that has ever gone to Court involving the question of the use of a reporter in negotiations.

618 Now, quite recently there was another case before the Board. Now, this is at the Trial Examiner level. Trial Examiner Reel, Frederick U. Reel—

The Court: This is the National Mediation Board?

Mr. Devaney: National Labor Relations Board, Your Honor.

The Court: Oh, NLRB. All right.

Mr. Devaney: The Mediation Board is not a deliberate body that makes decisions.

The Court: I understand.

Mr. Devaney: So far as I know, in this area.

The Court: I wasn't sure whether you switched back and were talking about the Mediation Board. You are still talking about the National Labor Relations Board?

Mr. Devaney: Yes, your Honor.

The Court: All right.

619 Mr. Devaney: Now, Mr. Reel, in a case which was released in March—March 29 of 1964, the *St. Louis Typographical Union No. 8* and *Union Employer Section of the Graphic Arts Association of St. Louis*—it's NLRB Case No. 14-CB-1135—had this to say:

"In support of the argument that a party to the negotiations may properly insist on a transcript, general counsel and the Association advance a number of appealing reasons. They point out that such transcripts can be of great utility in the course of bargaining, facilitating reference to points agreed on or positions taken at earlier sessions, spuring the actual bargainers from laborious note-taking, thus enabling persons who are absent from a session to catch up on what transpired. Such transcripts moreover can be of great value even after the bargaining has been concluded. When a contract is reached, a question of whether a particular subject matter was dis-
620 cussed in the course of the negotiations may be of great importance in issues arising after execution of the contract."

And he cites a case which I'll omit.

"If a contract is not reached, the question of whether a particular party was negotiating in good faith may turn in part at least on statements made in the course of bargaining."

And again he cites authority which I shall omit.

"In either event, a stenographic transcript of the negotiations can be of marked assistance to the parties, the Board and the Courts in determining what was said."

Now, he goes on to say:

"The considerations urged by the respondent appear to be far less compelling, that such a transcript may be used

at subsequent Board or Court proceedings seem to me to be an argument for, not against keeping a record. If what is said at the bargaining conference becomes
621 relevant in a subsequent proceeding, an impartial court reporter's transcript taken at the time would seem preferable to the recollection of interested parties. By the same token, the argument that the statements of relatively untutored or unprofessional representatives of labor do not look good on the record when contrasted with the polished speech of management representatives, carries little force. Even if we assume its premise, we return to the proposition that if future attention is to be paid to what was said in the negotiations, the witnesses will be asked to repeat as nearly as possible what was said without rephrasing it to elevate the tone or diction of the speaker. The respondent also urged that a stenographic transcript may not be perfect but this obvious truth is of little avail for in subsequent use of the transcript, the way will be opened for correction or for express reservations as to its accuracy on particular points."

622 Now, he goes on and I'm not going to read all of it.

The Court: I'm sure he does. He's gone on a good ways now.

Mr. Devaney: Yes.

The Court: The point is, one person says, "I won't bargain without a reporter here"; and the other person says, "I won't bargain with one here". They both refuse to bargain. They don't get very far.

Mr. Devaney: Well, it is a question, Your Honor—

The Court: It's arguing about—it's just an argument about which one was more granite hard in their resolution to stick to this position.

Mr. Devaney: Except that I believe that it goes further than this, Your Honor; that the refusal to meet because of some alleged technical procedural objection seems to be the clearest kind of evidence that you could have that the

party who takes this position is really not willing to
623 bargain at all.

Now, the third item which is listed in Paragraph 11 under (c), to say that we have not followed our obligation to make no change in rates of pay, rules and working conditions as embodied in agreements except as permitted by Section 6.

Now, as I have said already, the carrier gave the Section 6 notice. Our obligation quite clearly, if we were going to change these agreements, was to give the notice of desire to change the agreement. Now, having done this, the Act very clearly imposes on the parties, on both parties, an obligation to make reasonable effort to compose the differences that exist.

This was stated very clearly in *Virginia Railroad* v. *System Federation*, 300 U.S. 515, at page 548, decided in 1937. The same point was made in *Elgin, Joliet & Eastern Railway Company* v. *Burley*, 325 U.S. 711, at page 721. And that was decided in 1945. The Central—the *IAM* v. *Central Airlines* case was 372 U.S. 682, 10 L. Ed. (2d) 67, at page 73, decided in 1963.

Now, these were all cases that involved the construction of the obligation to meet and to confer, ex-
624 cept the last one and I don't recall whether it involved that specifically but involved the statement by the Court that this was a mandatory obligation under the Act.

Now, if the union in this case can close the door to all bargaining by refusing to take the first step, we believe that it's plain that they have blatantly violated their obligation under the Act. While it is certainly written in terms of imposing this duty to meet and confer, obviously it presupposes that the parties are going to do this.

Now, when the door is closed to bargaining, we believe that the Chicago Northwestern case, that is, the *Order of Railroad Telegraphers* v. *Chicago and Northwestern*, which was cited by Mr. Shapiro and is 362 U.S. 330, in 1960,

represents a clear recognition of this right in the majority opinion. This, as Mr. Shapiro very correctly pointed out, was a case where the carrier proposed to make changes in its central agency plan and the union served a Section 6 notice. In response, it was met by the statement of the company that it wouldn't bargain. Now, it said that
625 the reason it wouldn't bargain was that this was to be determined by the Interstate Commerce Commission or various State commissions, and it later carved out an area about which it was willing to bargain. But about the union's basic Section 6 notice, it said that "This is not a matter we are required to bargain over. Your demand is unlawful." And Justice Black clearly recognizes the holding that the carrier had refused to bargain, whereupon the union engaged in a strike.

The majority—he equates this action to a situation where the refusal of the party to take this first step resulted in the self-help.

Now, it's quite true that Chicago and Northwestern is certainly distinguishable upon the ground that that involved an injunction against the strike and therefore a construction of Section 4 of the Norris-LaGuardia Act.

We believe that Reed, the Virginia Railroad, Joliet, and Central Airlines, Chicago and Northwestern together, clearly indicate that where one party refuses flatly and absolutely to begin bargaining, to take the first step that is required by the Act, that he is completely frustrating every purpose that is intended by the Act and that this
626 justifies self-help.

Now, from a technical standpoint, we believe that this is consistent with the Act, too. And we would call Your Honor's attention to the fact that Section 6 says in part that a party shall give 30 days written notice of an intended change in agreement. There will be the time and place for the beginning of conference between the representatives of the parties, and that this time and place shall be agreed upon within 10 days after receipt of the

notice and within 30 days provided for in the notice itself. And it says that in every case where such notice of intention has been given where conferences are being held, where services of the Mediation Board have been requested or the Board has proffered its services, rates of pay, rules and working conditions shall not be altered. Then it goes on to say:

"Unless a period of 10 days has elapsed after termination of conferences."

Now, at the very outset, it's clear, I believe, that Section 6 was fully cognizant of the fact that there could not
627 be a closing of the door to meeting by the party. That is, if you receive this notice, if you did not have a conference, that this permitted self-help.

Now, we believe that where there is a complete refusal to bargain and where there is a complete refusal to bargain as in this case, in contravention of the practice that had long been followed between the parties, that this means that there was no conference within the meaning of the Act. The conference means that the parties will meet and confer and make an effort to reach agreement. Where you refuse to meet as Section 6 specifically says, there is no conference.

Now, if we are wrong about this and we notified the was the same refusal to bargain. And it is quite true that because there was the refusal to bargain, the company felt and it feels now that it was entitled, because the refusal of the union to take this first step looking toward an agreement which is imposed as a mandatory obligation by the Act, that it could resort to self-help at that point.

Now, if we are wrong about this and we notify the Mediation Board after they had told us that the
628 cases have been docketed, we nevertheless at no point refused to meet with the representatives of the Mediation Board. And the Mediation Board told us back in

October, I think one of the letters may have been November, that they were going to assign a Mediator.

Now, let's turn for one brief moment to look at Section 5. This is the Section which deals with the obligation and duties of the Mediation Board. Now, Section 5, First says, in part, that the Board shall promptly put itself in communication with the parties and shall use its best efforts by mediation. And it goes on down and says that if such efforts through mediation shall be unsuccessful, the Board shall at once endeavor as its final required action, and that's except the Emergency Board under Section 10, to induce the parties to submit their controversy to arbitration. If arbitration shall be refused, the Board shall at once notify both parties that its mediatory efforts have failed, and then, for 30 days thereafter, no change shall be made in the rates of pay.

Now, I don't think there can be any serious argument that Section 5, First imposes a very clear
629 duty on the part of the Mediation Board to promptly put itself in communication and to promptly begin its mediatory efforts, or promptly at least to notify the parties that it isn't going to.

Now, in this case the Mediation Board took the position that it was going to assign a Mediator despite the company's position.

Now, it comes here in this action and it says that, "No, we don't—we didn't mean that. We really aren't going to assign a Mediator as long as the company has said that it—that it has put these provisions in effect."

Now, this is not what it said in the correspondence previously. It has waited some six or seven months before it has come to this position, and this is why we say that we do not believe that the Mediation Board, even if it has jurisdiction and because the company has not properly put these changes into effect, that it itself has not complied with the obligations imposed upon it under the Act.

Now, the last point that is mentioned in Paragraph 12 of the complaint is under (d) and that is that we are
630 not permitted to make these changes until the matter has been finally acted upon by the Mediation Board.

Now, as I understand the position of the Mediation Board, Mr. Shapiro, the Mediation Board's position is that it hasn't done anything and it has no intention of doing anything and this may be forever, as far as their position is concerned, and that they are saying that until they get through, no matter how long it may take, no party may take any action whatever.

We submit to Your Honor that this is on its face not a reasonable position, either that the Mediation Board had jurisdiction or it had not. If it did have, it ought to have assigned a Mediator and it ought to have tried to bring the parties together and it ought to have pursued mediation without refusing, as the testimony clearly shows it did, that it refused even to call a meeting of the parties when the parties were willing to meet; that the Mediator has gone back and the Board has advised the company that this particular mediation, which was with the IARE, has been recessed for an indefinite period of time.

Now, what are they going to do? Are they
631 going to sit on the outside without making any effort to mediate it? They objected to the presence of a reporter and we offered to meet separately with the union with a reporter and that any private discussion with the Mediator would not be reported. And this, they rejected out of hand as being something they were unwilling to do.

Now, Paragraph 12 injected for the first time the idea that Florida East Coast has not bargained in good faith.

Now, the only question of good faith that could possibly be raised is this reporter question. We think there can be no serious doubt that we had a perfect right to ask that the negotiations be—that minutes be kept by a reporter. And at no time has this been objected to, to the

point of a refusal to continue with negotiations, until this period of 1963.

Now, we don't believe that this newly arrived at concept, for no reason that has been pointed to by anyone as justifying their position, warrants the refusal to take this first step looking toward bargaining. And for the Government to contend as it has that Florida East Coast is there-
632 fore guilty of bad faith, we think is totally without foundation.

Now, Count II involves the union shop notice of July 31st and, except for the difference in subject matter, the difference in dates, the same allegations were made in the complaint under Count II as were made with respect to Count I.

And Count III deals with this question again of the "Conditions of Employment".

Now, it is clear from the complaint and it's certainly made very clear in the Government's position in its memorandum in support of its Motion for Preliminary Injunction that no carrier may operate during the period of the strike except in absolute, strict compliance with the terms of all collective bargaining agreements that were in effect before the strike began.

Now, as I have said, the testimony in this case leaves no question whatever, Your Honor, that if this is so, and what the Government is saying here is that no carrier has the right to operate during the period of the strike, now, this is contrary to their own admission. It is contrary to all of the holdings of the Supreme Court, and I believe that the contention is obviously erroneous on its face.
633 We have the right to operate if we can during the period of the strike. The only way that any operation is possible is to use such manpower as we had.

Now, the contention has been made here by Mr. Shapiro that somehow the carrier has not hired enough people rapidly enough; otherwise we would have enough people today to operate under the old agreement.

Now, the testimony is uncontradicted in direct opposition to this statement. There isn't any doubt that the Florida East Coast has hired personnel from February 3rd, 1963, as rapidly as it can train them; that this training program has not decreased; that we have continued this program to the present time; that we still have only enough employees that, if we are required to operate only under the terms of the agreements as they existed before the strike, we would have to reduce the amount of service by at last 50%.

Now, Mr. Shapiro has said—

The Court: You've talked an hour. Do you want much more?

634 Mr. Devaney: No, Your Honor. I'll be very brief.

The Court: All right.

Mr. Devaney: Mr. Shapiro has suggested that the "Conditions of Employment" have relevance only with regard to the scope of the order. Now, we don't think that this is entirely true either. To begin with, the provisions of the Act which he has referred to have various provisions that there should be no change in conditions, rates of pay, hours and conditions, that is, until the notice is processed through the procedures of the Act.

Now, the procedures—I'm sorry—the condictions which have been required, imposed by the strike, were not substantially different than the conditions in the "Conditions of Employment". So that we say that if we are accused and if the Mediation Board says that we improperly changed the agreement, that there is no indication that we have not complied or that we have violated the Act in any way because the Act merely says that you shall not at that point change the conditions. We didn't change the

635 conditions to those imposed by the strike. We merely operated in the only way that we could operate.

Furthermore, we believe that the union shop question is separate to the extent that the unions on strike clearly do

not admit to membership these people who are now working, at least during the period of the strike. Unlike the BRT case that was before you earlier, Your Honor, there has been no attempt by any of these unions to try and enforce the union shop agreement during the period of the strike.

Now, the BRT had served notice on quite a number of employees, demanding their discharge because they hadn't become members of the union. That is not present in this case.

Now, Mr. Shapiro speculated as to why or what conceivable basis our assertion was made that the unions on strike had relinquished their claim to representation.

The Court: It was based on these letters.

Mr. Devaney: It is based on that in part, Your Honor, and in part on the statement which is set forth in
636 their Strike Call, which they very plainly say that, "All the employees represented by us are out here on strike."

Now, we merely say that this—during the period of the strike, Your Honor, we believe that it is totally unrealistic to take the position that representation by the union does continue during the period of the strike for all purposes on the same basis. There isn't any doubt that, if they negotiate a new agreement, it would be applicable to all the employees within the class or craft. But as the unions in this case who were on strike have very clearly indicated, they haven't taken any of these new people into membership. They wouldn't be eligible if they did apply. And such members as have returned to work in many instances have been fined or expelled, or at least are subject to such action. And we believe that one, Mr. Hamilton, testified that while they haven't taken this action they have deferred this whole matter for decision until after the strike is terminated; but I think that the fact that these people who are now working are not eligible for membership,
637 and whether they have been expelled if they are a former member, I think that they are all subject to

it. And for this reason, we believe that, whatever else may be true of the union shop notice, during the period of the strike this act of discrimination has rendered the union shop agreement totally unenforceable as to the new employees and we believe that this is required by Section 2, Eleventh, because Section, 2, Eleventh of the Act says that no agreement shall be permitted which discriminates against any employee with respect to whom membership is not available on uniform terms and conditions.

Thank you very much.

The Court: Yes, sir.

Do you want to go ahead at this time?

Mr. Rutledge: No, Your Honor. As a matter of fact, we submit that there wasn't anything new here presented. We've presented our position to the Court in the prior case and submitted the brief to the Court and our legal position is the same. I would only like to point out one difference here between the BRT case and this case, and that is
638 in the BRT case, there was more substance, although we submit not much, to their contention that it was a minor dispute, because they said in the BRT case that they were operating under the "Conditions of Employment" which were in effect during the strike. They don't even say that here. They say they are operating under a contract which they put into effect unilaterally. They say they have the right to do it because the union didn't negotiate properly, or something of that sort, despite the fact that the Mediation Board has taken jurisdicion; but they are not claiming here that they are operating under some sort of contract suspension theory. They are actually saying, as I understood the testimony, that they are operating under a "Uniform Working Agreement" which they have put into effect under Section 6 legally.

So we submit that the major-minor issue here is really non-existent. This clearly is a major issue and the Norris-LaGuardia phase of the matter, we submit the same authorities we cited to you apply; and that here the issue is

whether the railroad that decides to operate during the strike also has the right to operate legally free of the restrictions of the Railway Labor Act. We submit
639 the plain language of the Act, the policy of the Act require that the decision of the Court be that, if a railroad decides to operate during the strike, it still must operate according to the terms of the Railway Labor Act.

Thank you, Your Honor.

Mr. Shapiro: Unless Your Honor has questions addressed to the authorities and matters Mr. Devaney referred to that I didn't anticipate in my argument in chief, I'll rest at this point.

Mr. Devaney: Your Honor, there is one point I neglected to mention.

The Court: A little louder, Mr. Devaney.

Mr. Devaney: I say there is one more point I neglected to mention, which I think is important. We raised it in our brief.

This is the basic contention that we do not believe that anything that has been said here by the plaintiff or the intervenors has shown any conceivable basis for the claimed irreparable harm.

640 We think, in the absence of this, that clearly the Norris-LaGuardia Act bars any injunctive relief, any preliminary injunctive relief.

Now, we have shown the irreparable harm to the Florida East Coast. But nothing that Mr. Shapiro has said, nothing that the unions have said, has indicated the slightest irreparable harm to the public interest which they assert is in existence.

The Court: You may want to reply to this.

Mr. Shapiro: Yes, Your Honor. I do.

The irreparable harm here is the harm to the operation of the Railway Labor Act, to the function of the Mediation Board, to the effort to minimize and eliminate this dispute by going through the processes of the Act. Every time that the processes of the Act are frustrated on an extra-

ordinary scale as they have been frustrated in this case, there is irreparable harm and direct irreparable harm to public interest. And that is why we come seeking injunctive relief.

641 Mr. Devaney: If I may respond to that, Your Honor, may I simply say this:

That the alleged violation of the Railway Labor Act seems pretty difficult to extort and to construe the obligations of the Railway Labor Act, since the strike occurred—it is a legal strike; we don't contest it—but I defy Mr. Shapiro or anyone else to point to any provision of the Railway Labor Act which was designed or intended to govern what happens during the period of a strike. This whole Act was designed and was intended to govern what happens to the agreements in normal operation. There is nothing in the Act which says that during the period of a strike you cannot continue to operate. All the decisions of the Supreme Court have clearly indicated on this point that employer has the unquestioned right to operate during the period of the strike.

Now, we have cited these cases from the Railway Adjustment Board where the same kind of issue has been considered. Not one case has anybody cited to Your Honor which challenges this one iota; not one authority has been cited for this. This case is purely and simply one

642 of a strike where the carrier has merely reacted to the questions presented in the course of the strike.

Now, after those conditions have come into existence, then it is quite true they did give the Section 6 notices; but the problem at the outset is one of the strike itself. This is not a question that is even within Section 6. This is not a question that, once the unions are free to resort to self-help, the Railway Labor Act and the provisions of the Railway Labor Act as to the strike itself ends. It does not go beyond that point.

The Court: I certainly agree. I suppose Mr. Shapiro and the other gentlemen will agree this is the basic point

of difference in the view of the law expressed by the United States and by the intervenors and that that you express here.

Do you want to reply any further? I tell you, he's probably going to want the last word whatever you say, so go ahead.

Mr. Shapiro: Your Honor, I think the only authority that we haven't mentioned before in this was the *Mine Workers* case and, as to that, having read it at the
643 time that the Government thought there was going to be a national railway strike, I can say that it stands for the proposition that after the processes of the Railway Labor Act are exhausted, the Norris-LaGuardia Act prevents the United States from obtaining the kind of injunction it could have obtained in the Debs case; but that is after the processes of the Railway Labor Act have been exhausted.

Now, I don't think that I have any other matter that has not at least been touched on.

The Court: Is this last case cited in the brief?

Mr. Shapiro: It was cited by Mr. Devaney's argument. It is United Mine Workers—*United States* v. *Mine Workers.*

The Court: Oh, I thought you said Iron Workers.

Mr. Shapiro: No, it's Mine Workers.

The Court: I know the case you're talking about now.

Mr. Shapiro: I think we have at least touched upon every other point they have raised and indicated our position.

644 The Court: Well, Gentlemen, I'll say this:

I'll try to reach a prompt decision. I do think I may delay it for a reasonably short time to see if something does come out on this Trainmen's case, out of the Court of Appeals reasonably promptly.

I don't undertake to delay a decision on this case until they decide it because it might be sometime, but I think that some opportunity to see what is coming out of that case ought to be indulged.

I'll reserve the right to call on counsel for either or both parties to furnish me proposed findings and conclusions. I'm ready to do that at this time and study the matter more.

If there is nothing further, we'll take an adjournment in this matter.

Mr. Shapiro: Thank you, Your Honor.

Mr. Devaney: I think Mr. Milledge wanted to ask a question about 64-112, the Motion in that case. Did you want to set a time later this afternoon or a later date for argument in that?

645 Mr. Milledge: That is the Adjustment Board? Is that the one you are speaking of?

Mr. Devaney: Yes.

Mr. Milledge: That was the case, Your Honor, where Mr. Devaney contends the case should be stayed because the railroad, about a year ago, requested a rehearing which has never been ruled on. I believe you said that at the conclusion of this case that we might argue it.

The Court: Do you have that file here, 64-112? It's a new case that was just filed a few weeks ago and Mr. Devaney has moved to dismiss it or stay it.

What comment would you make about his motion?

Mr. Milledge: Well, it's a law suit—

The Court: Would you agree to a stay, that it should be stayed?

Mr. Milledge: No, Your Honor can read the provision of 153(p) which both authorized the law suit and also
646 does not provide for any stay. It doesn't provide for any rehearing, as a matter of fact. There is no provision for a rehearing at all.

Now, you'll notice in Mr. Devaney's motion that this, the Petition for a Rehearing, was filed over a year ago. The Adjustment Board is composed of an equal number of railroad-designated people and company—union and management people, and then there's one impartial person. And a rehearing just sits there and will sit there forever

unless the proponents bring it up; and, of course, they haven't seen fit to do that in over a year.

Now, there is no statutory authority whatsoever for staying this pending rehearing because the rehearing is not provided for by statute. And of course, this could also happen in a Court proceeding. A District Court judgment is not automatically stayed unless a supersedeas or some provision for staying it.

The Court: The positions are: He says that it was not administratively final so that you could bring a suit.

647 And you said that it was administratively final so that the suit could be brought.

Mr. Milledge: Right. And the statute 153 (p) provides that.

The Court: I wonder if you gentlemen would be agreeable to submit this motion without further argument?

Mr. Devaney: I have no objection, Your Honor.

The Court: I tell you, I would suggest this: That we consider it submitted and with the right of either party to file a brief, to send me briefs on it within ten days if there is something you want to argue on brief. That is the whole point.

Mr. Milledge: That's it.

Mr. Devaney: We have submitted to you already a memorandum.

The Court: I don't believe.

Mr. Devaney: We filed it, Your Honor.

648 The Court: No, this looks like you gave me two or three copies of the motion.

Mr. Devaney: Yes, Your Honor.

The Court: Let me pull off one of these and give you the remainder back. You may want those extra copies.

Mr. Devaney: Now, I would merely call Your Honor's attention to the fact that, as set forth, there is an Opinion of the United States Attorney General dealing with this question. Opinion of the Attorney General 212, at the first page of our memorandum, and we have no objec-

tion whatever to submitting it on the memorandum that we have already submitted and served on the plaintiff.

The Court: Maybe you would reply to this memorandum?

Mr. Milledge: I will.

The Court: In a week or ten days and let me rule.

649 Mr. Milledge: Right. I don't think I have a copy of the memorandum. I have a copy of the motion. Judge, there is just one other thing; it's just a ministerial matter in regard to this. 153(p) provides that you proceed without payment of costs. The Clerk read—the Clerk's office, Mr. Blake, read the statute and didn't require me to pay any filing fee. The Marshal's office was in doubt as to this and sent me a bill and I have an order on this, which you could enter at some convenient time.

The Court: That's in the same case, is it?

Mr. Milledge: Yes, sir.

Mr. Devaney: I have no objection to that.

The Court:

"The petitioner shall not be liable for the costs in the District Court and the costs in any subsequent proceeding."

Well, your order may not—well, I think that's all
650 right. Go ahead and enter it. There is something in the Act there that this order may have to be amended to follow this provision:

"Such costs shall be paid out of the appropriations for the expenses of the Courts of the United States."

Now, that may have to be put in here.

Mr. Milledge: All right, sir.

The Court: But a any rate, we can enter this order. This is the 28th.

The Clerk: Yes, sir.

The Court: Well, I'll hold this motion until I have a reply from you.

Mr. Milledge: All right, fine.

The Court: A week or ten days.

Mr. Milledge: It will be very short.

The Court: All right. Then we can take an adjournment.

651 Thank you, Gentlemen.

(And thereupon, at 1:15 o'clock p.m., on Thursday, May 28, 1964, the Court adjourned.)

* * * * * * * * * *

1 IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 64-107-Civil-J

UNITED STATES OF AMERICA

v.

FLORIDA EAST COAST RAILWAY COMPANY

Transcript of Proceedings

Before the HONORABLE BRYAN SIMPSON,
Judge of the above Court,
Commencing at 10:05 o'clock a.m.,

Monday, November 30, 1964.

JOSEPH A. SHERIDAN,
Official Reporter.

2 Appearances

For the Plaintiff:

Howard E. Shapiro, Esquire
Department of Justice,
Civil Division
Washington, D. C.

For the Defendant:

Messrs. Steptoe & Johnson
1100 Shoreham Building
Washington, D. C. 20005
By: William B. Devaney, Esquire
—and—
J. Turner Butler, Esquire
814 Florida Title Building
Jacksonville, Florida.

For the Intervenors:

Messrs. Rutledge and Milledge
601 Flagler Federal Building
Miami, Florida 33132
By: Allan Milledge, Esquire

2-A INDEX OF WITNESSES

	Direct	Cross	Redirect	Recross
For Defendant:				
Hamilton, I. E.	62- 95			
Webb, Howard E.	97-129	130-138		
Hales, H. E.	139-147	148-166	167-171	
Davidson, Jr., A. A.	174-179	180-200	200	
Wyckoff, Raymond W.	202-237	237-277	277-284	284-293
Thornton, W. L.	299-318; 352-353	318-321; 354-361		
For Government:				
Wyckoff, Raymond W.	363-372			
For Intervenors:				
Wyckoff, Raymond W.	373-382			
Cooke, R. M.	383-400	400-424	424	
Rebuttal (Defendant):				
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For Defendant:	For Identification	In Evidence
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X	64	"
Y	85	"
Z	85	"
AA	90	"
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DD	119	"
EE	119	"
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GG	207	209
HH	210	211
II	221	227
JJ	281	283
KK	428	430
LL	436	438
MM	445	(Excluded)
NN	445	"
For Intervenors:		
1	—	400

3 The Court: Good morning.

The appearances are the same as before.

This is a postponed hearing set earlier on the Application of the Defendant in 64-107 for approval of employment practices in certain listed categories; in effect, for modification, is what it would be, modification of the Preliminary Injunction.

Mr. Devaney: Well, essentially—

The Court: Under the terms of the Injunction.

Mr. Devaney: That is correct.

The Court: Under the terms of the Injunction, the Defendants were given leave to apply for approval of necessary changes, changes made necessary by the strike conditions.

Mr. Devaney: That is correct, Your Honor.

The Court: All right, I'm ready. I suppose you have the lead here. If you want to make a preliminary statement or if there are any stipuations with respect to facts that you gentlemen have worked out, I'll take any preliminary matter and then go on into the hearing.

We have not worked out any stipulations, Your Honor. I would like, as a preliminary matter, to say that we have filed an Application in 64-239, which we have requested be heard at the conclusion of this hearing on the Application in 64-107.

The Court: 64-239 is—

Mr. Devaney: The Engineers' case.

The Court: —the Engineers' case.

All right, sir, I'll undertake to hear that. I have another matter set at 2:00 or 2:30 this afternoon which I believe has gone off. My secretary is 'phoning counsel now and I'll be able to give you—if it stays on, we might have to take a break and come back later in the day but we'll get to it.

Mr. Devaney: Very well. Thank you, Your Honor. This, as you have indicated, is an Application pursuant to the terms of the Preliminary Injunction which was entered on October 30th.

Now, we have placed into effect all of the provisions of the prior collective bargaining agreements, including the wage rates and the job descriptions, the hours, as to the lunch hour. We reinstated all of the provisions of the prior collective bargaining agreements and the Defendant has advertised, through the bulletining procedure, for the additional jobs required to permit it to comply with the collective bargaining agreements.

We received out of the hundred and, I believe, 114 jobs bid, we received a total of three bids, one of whom was by a person not qualified for the position bid. One of the

two remaining bidders declined to cross the picket line and report for work. Only one additional person actually reported for work. Now their responses, or at least some of them, are indicated from the organizations themselves in Exhibits 1 through 14 which are attached to the
6 Application for approval of employment practices.

Now, additional responses have been received from individuals. And following the initial failure of the employees to submit bids, pursuant to the provisions of the agreements which provide for the assignment of senior employees where no bid is received, Defendant took this step and assigned employees to the various jobs for which the bulletins had been issued. And through this procedure, we received a large number of individual responses from these individuals, declining to report for the assigned jobs.

Now, this means, as far as the Defendant is concerned, Your Honor, that we have put into effect and into operation all of the provisions of the existing collective bargaining agreements concerning the wages, the hours, the working conditions, and we are now complying fully with the provisions of those agreements except to the extent that the lack of man power prevents our doing so. And these are the subject matter of this Application.

Now, the first request is that we shall not be deemed in violation of any existing collective bargaining agree-
7 ment for failure to observe craft or seniority district restrictions.

Second, that we shall not be deemed in violation of any existing agreement by requiring and permitting supervisors to perform craft work, so long as we do not have sufficient qualified personnel.

Three, that we ask that we not be deemed in violation of any existing collective bargaining agreement by exceeding the apprenticeship or the apprentice or trainee ratio and the maximum age limitations contained in the agreement.

Now, the apprentice ratio or the trainee ratio, Your Honor, means that, under normal circumstances, you may

have only a given number of apprentices or trainees to the number of journeymen in a particular craft.

The Court: That's set by this separate agreement, I suppose?

Mr. Devaney: That's correct, Your Honor.

In addition, the agreements place two limitations on the maximum. There is a minimum age on apprentices, which we are not concerned with. There's also a maximum
8 age of the apprentices, that is, the maximum age for a person to enter the apprentice training program. There's also maximum age on a person entering or being employed as a helper.

Because of the shortage of man power, we have had to hire people possessing qualifiations to do the work. And if we are to provide the people eventually required to comply with all of the craft lines, we have no choice but to continue to hire people without regard to these technical limitations on age and the ratio of apprentices to journeymen.

Now, five, we do not believe that the agreement places any limitation on our right to contract out work which is presently being contracted out; but to avoid any later assertion that we are doing or engaging in a practice that is in someway in violation of the Order, we also request that we be permitted to continue the contracting out of work, which has been necessary since the strike began because of the shortage of qualified personnel to perform it with our own employees.

Number six—

The Court: Going back to five: Generally, what is
9 the type of work that is contracted out?

Mr. Devaney: Well, in the beginning of the strike, Your Honor, part of the Maintenance of Way work was contracted out because we did not have employees to perform it. Now, those—the general Maintenance of Way has been taken over by the Florida East Coast's own em-

ployees as we have acquired the employees, and the employees with sufficient skill to perform this work.

There is certain bridge construction which, as a matter of fact, bridge construction or various types of construction has always been contracted out when the Carrier did not have the equipment or the personnel to perform it. There is some bridge construction work which is being contracted out at the present time.

In the installation of CTC, the work had been undertaken prior to the strike by Florida East Coast with its own employees. When the strike began, we did not have any employees who could do this work, except the supervisors themselves, and the installation of CTC was contracted out.

10 The Court: Don't—you'll have to amend that shorthand CPC doesn't mean anything to me.

Mr. Devaney: This is Centralized Traffic Control, Your Honor.

The Court: CTC?

Mr. Devaney: CTC, yes, Your Honor; Centralized Traffic Control, which is being installed on—

The Court: I've heard, I know what it is now. I thought you said CPC and I misunderstood you.

Mr. Devaney: Those basically are the types of work that we are contracting out at the present time. None of this work that is being contracted out, Your Honor, is—I mean, this is work which we have had to contract out since the beginning of the strike. It is not work which we are suggesting should now be contracted out to avoid the compliance with the Order of the Court in any sense. This is work that, from the beginning of the strike, has been contracted out because of the shortage of man power to perform it with our own employees.

11 Number six relates to the bridge tending, which is being performed by supervisory or contract employees during the period of the strike. Now, the Maintenance of Way agreement does provide that the normal

operation of bridge tending would be performed by members represented by that organization. With the advent of the strike, there were no members of the organization available and, as part of the over-all security imposed upon the Railroad by the strike conditions, the bridge tending has been and is now being performed as part of the over-all security operation of the Railroad.

Number seven, we ask that we shall not be required to furnish seniority rosters except upon express Order of the Court conditioning the receipt of the rosters by the General Chairman or other designated official to the proper and legitimate use of the seniority information, for the proper and legitimate policing of their collective bargaining agreements; and if any misuse is made, that such official will be answerable to the Court.

Number eight, we ask that the Union Shop provisions of each of the collective bargaining agreements
12 be declared void and unenforceable as to new employees hired since January 23, 1963, or as to returnees, unless and until the organization, including both the Local and the International, demonstrates that membership is available to those new employees without discrimination.

Now, in connection with the last matter, Your Honor, it was developed on the record in the initial hearing that various discriminations had occurred as to the employees working since the period of the strike and that none of these new employees had been admitted to membership. Since that time, Your Honor, we shall show that the present employees have made application for membership, that none of them have been admitted; that in fact, instead of admitting them, they have again sought a great deal of information about the individuals which does not appear to have any reasonable relationship to the ordinary application for membership.

These conditions we believe, Your Honor, are reasonably

necessary for the continued operation of the Railroad under the strike conditions.

The Defendant is now providing service to the
13 public which the public needs and requires. We can and will continue to provide the service if we are free to continue to use the employees that we have available.

We have made every reasonable effort, not only through the present bulletining procedure but in hiring and training employees throughout the period that we have been operating since the strike began, to hire and train employees and, pursuant to the Order of this Court, we have bulletined the jobs which were immediately required to permit us to comply with the provisions of the various agreements of the organizations. And as I've said, we got essentially no response—three out of a total of 114 jobs were bid. Only one of the bidders actually showed up for work. This means that we simply do not have presently available sufficient personnel to permit the full compliance with the provisions of the collective bargaining agreement relating to the crossing of craft lines, relating to the supervisors performing absolutely no scope work, and with regard to the apprenticeship limitations as to age and to ratio, and with regard to the bridge
14 tending, which as a security measure has been of necessity made an over-all part of the security measures of the Defendant.

Now, I might say that in addition to the necessity for making protection of the bridges part of the over-all security measures of the Defendant, that the Maintenance of Way organization specifically responded that its employees were not going to be permitted to accept any of the positions which were bid. Now, these were not bridge tending jobs, Your Honor, but that they would not be permitted to return to work during the period of the strike.

So that we, again, are faced with a situation that under no circumstance would those people be available for work;

and because of the necessity of providing protection for the various bridges, the work that they are now doing has taken on a different and broader aspect than merely the bridge tending. It's part bridge tending and it is part the security of the bridges. Quite a number of bridges have been destroyed and other attempts to destroy bridges have been made, and this is a necessary measure which the Railroad has had to take in order to protect its property and to protect its present employees against additional danger from the sabotage of its property.

Now, for these reasons, Your Honor, we believe that all of these conditions are reasonably necessary to permit us to continue to operate and we are prepared to present additional testimony in evidence to supplement the record which has already been made in this matter, which in general ways relate to some of the provisions, but we believe that the specific information with respect to the actual steps taken in bulletining procedures, and responses, as well as our over-all training program is necessary for the full understanding of the Court in ruling on this Application. And we are prepared to go forward with this evidence.

The Court: Do you want to make any reply before we start? You or the Intervenors?

Mr. Shapiro: Just very briefly, Your Honor.

Since this is an Application under Paragraph 2(b) of the Injunction of October 30, it is to be guided by the decision of the Court of Appeals in *Brotherhood of Railroad Trainmen* v. *Florida East Coast Railway Company*, now reported at 326 F. 2nd 172.

In that decision, as we understand it, the FEC must convince Your Honor of the reasonable necessity for the departures from the collective bargaining agreements which it seeks in the light of the present strike situation on the Carrier, and this must be by a select item-by-item approach. Those are the words the Court of Appeals used.

Now, the Government would like to preserve its disagreement for the record with the Court of Appeals' decision, recognizing of course that Your Honor is bound by it at this time.

Just summarizing it, we think that the decision, insofar as it authorizes departures from the express language of the Act, is inconsistent with the statutory language—that it will expand the area of controversy in labor disputes beyond the areas which are contemplated by the statute; that it will invite the transference of labor disputes into the Courts; that the standards that it lays down do not provide sufficient guidance and that it renders a precise statute which is in part enforceable by criminal sanctions unduly vague.

17

Now, having preserved the objection, we turn to the sufficiency of the Application by the FEC under the Fifth Circuit's decision.

There are two items in the Application, I think, which should be stricken on this proceeding. They are Items 7 and 8 relating to the furnishing of seniority rosters and to a declaration that the Union Shop provision is void and unenforceable. Neither of those provisions in the Application relate to the operation of the Railroad. Whether the seniority rosters are furnished or not is not a matter which will either benefit the Carrier or harm it.

The Union Shop provisions simply relate to a matter of employee rights. They do not directly involve the operation of the Railroad.

We believe that those have no part in this proceeding under Paragraph 2(b) of the Court's Decree.

Now, that leaves Items 1 through 6 of the Application, as listed on pages 2 and 3.

Our first objection is that, with the exception of Items 3 and 6, these are not item-by-item applications as contemplated by the Court of Appeals' decision.

18

Now, Item 3 deals with apprentice ratios, which I understand cuts across the board in all these collective bargaining agreements. Since the Carrier is forced to resort to non-Union help, obviously it can't hire journeymen with any ease since most of the journeymen in the industry are Union people. I understand that it takes in the non-operating crafts some three or four years to become a journeyman, so the Government recognizes that the Carrier will have to resort to some apprentice help and we would not object to Item 3 in the Application.

Item 6 deals with bridge tending during the period of the strike. Now, that is quite specific and, without in anyway indicating the view of the Government that any labor organization is involved in any of the acts of violence which have been alleged in connection with this labor dispute, we recognize that the feelings have run high, there has been some danger to the Railroad's property, and since the matter of bridge tending is connected with the security of the Carrier, the Government would not object to Item 6.

Now, this leaves Items 1, 2, 4 and 5. These, we think, are too broad and too vague to be sufficient in law under the Court of Appeals' decision.

The first item is that the Carrier shall not be deemed in violation of any agreement for failure to observe craft or seniority district restrictions.

What is the scope of that? The Application doesn't tell us. Is it all crafts, all non-operating Unions? Does it affect the operating crafts or classes? Is it limited to the 114 jobs which were bulletined? Does it go more broadly than that? What jobs are involved?

Well, on its face, we think that item is simply too broad to mean the selective item-by-item requirement that is laid down in the Court of Appeals' decision. I think that the Court of Appeals contemplated an approach in which the specific jobs involved would be specified and the right to

depart from the agreement in connection with specific jobs would be demonstrated.

Now, the second item deals with the use of supervisors to perform craft work, so long as it does not have qualified personnel.

20 Again, the problem is one of scope. What positions are covered? How far does it go? We are given no indication at all in the Application or in the supporting affidavits as to the specific positions involved. In fact, we don't even know what the 114 jobs that were bulletined are, as far as this Application is concerned. No list has been provided to the Court and none to the Government.

What has been said about supervisors I think would apply equally to Item 4, dealing with non-exempt foremen.

Now, Item 5 dealing with contracting out suffers from the same difficulties.

Although these items, these four items I have enumerated, are in our view insufficient in law, I don't believe that the Application could be denied on its face. We are moving into a new area of law here and perhaps the Carrier can by proof make up these difficulties.

The affidavits which have been submitted do not satisfy these requirements, the requirements of the Court of Appeals' decision. They are worded very generally and

21 really give very little indication of what is precisely involved. We know only that the Carrier maintains that if it can—if it had filled the 114 jobs which it says it has bulletined, that it could then be in immediate compliance with the Court's Decree. This indeed was Mr. Thornton's language in his affidavit in which he says, on the second page of the Carrier's Exhibit 15:

"That in an effort to obtain the qualified employees necessary to perform the work of the various non-operating employees in full compliance with existing collective bargaining agreements, 114 jobs were bulletined. This repre-

sented the immediate number of jobs required to comply fully with the agreements."

Now, I think that a similar statement appears in Mr. Wyckoff's affidavit. And these statements should be considered in the light of the testimony which we heard earlier in this case, in which it was suggested that it might take as much as a year to come into full compliance with the collective bargaining agreements, and that something like 600 new jobs would be required.

How should the BRT decision be applied?

We have indicated in a memorandum filed on September 24 our view of the decision. We think that, when the Carrier comes in and asks for the extraordinary relief of being excused from the express requirements of Section 2, Seventh of the Railway Labor Act, it has a heavy burden. We think that it has to refer to the totality of circumstances surrounding the strike and that the Court should take into account not only the immediate application but all of the prior history of the strike which has been made of record, all of the prior proceedings relating to the strike. It should take into account the efforts of the Carrier to comply with the collective bargaining agreements, its efforts to restore operations in compliance with those agreements. It can take into account, of course, operating factors such as reflected by comparative levels of operation and financial considerations, although these are not, as individual mechanical items, controlling. It's the over-all picture which is controlling.

The Carrier is, of course, not permitted to depart from the collective bargaining agreements by reason of changes in its operating standards which are not directly related to the strike.

For instance, if the Carrier complains that it can't maintain sufficient qualified personnel because since the strike began it has increased its educational requirements or physical requirements or other recruiting requirements, these are exercises of its own choice not relating to the

strike and they do not excuse departure from the collective bargaining agreements.

Now, if Your Honor should be disposed to grant these items that the Carrier has requested after proof, we think that any approval of departures from the collective bargaining agreements should be subject to the requirement that the Carrier undertake a recruiting and training program aimed at brining itself into compliance with the agreements. And to this end, any authorization to depart from the agreements should be limited in time, and a very brief time, no more than four or five weeks, so that the Carrier is constantly under the obligation to go out and recruit and bring itself into compliance with the agreements. Absent this, why it becomes in the interest of the Carrier to prolong the labor difficulties as long as it can, because it is then able to operate free from the restrictions of the collective bargaining agreements which are there to protect the employees.

Now, that concludes the Government's statement.

The Court: Do you have a statement you care to make, Mr. Milledge?

Mr. Milledge: Just a moment.

Essentially, our position is very similar to the Government's. Our first position of course, as Your Honor knows, is that the same as the reasonable necessity. We have taken, requested certiorari, to the Supreme Court from the Court of Appeals' decision of the Fifth Circuit and we would like the record to be clear that we preserve our position that reasonably necessary exceptions are improper but they do constitute the state of the law at the moment.

We think clearly that the matters of seniority rosters and the Union Shop, there should be no testimony pertaining to them today. There is no question, it doesn't involve man power at all, and we have been through all of this. It has already been handled. There are no present problems regarding them.

I might say on Union Shop, the only situation there is the Union Shop provisions are still in effect. Employees might be subject to dismissal for failure to comply but, as Your Honor knows from the past testimony, in the first place, it's not the Unions that fire them. It has to be the Company that discharges the people and the organizations have made no requests for discharges. And so it's not a present issue that would have any relationship to man power at the present time.

Now, just by way of supplementing what Mr. Shapiro said, this blanket request, if they were granted in this form, we would have no collective bargaining contracts. Nobody would have any rights out there at all.

Now, there are different circumstances in different crafts which might possibly—I'm not sure what the proof is, but might possibly entitle the Railroad to some temporary exception as to a particular craft for a short period of
26 time; just as, for instance, this one about contracting out work, Your Honor asked Mr. Devaney about that and he's really only asking for that for two crafts, the Signalmen and the Maintenance of Way.

Now, I think the facts will show that the situation in the different crafts is quite different and the contracts are different, and there might be some need to use a supervisor or non-exempt supervisors in one craft temporarily but not in others. So I think the proof will have to come on to show what the situation is in different crafts.

Now, the one other thing is this: I assume that this Petition is directed only to the non-operating crafts. This law suit brought by the Government does possibly have a broader application but I think this could be taken care of by proof, that is, or at least by whatever Order is entered, that the Order will direct itself, in the event Your Honor does see fit to grant the Railroad any exceptions, will direct itself to a provision of a particular contract; or if it is broader than that, then to particular—perhaps particular types of provisions in several contracts.

But there is this great vagueness about the
27 Application as to what is being sought and it would certainly appear that they are only talking about the non-operating crafts presently on strike; but I think that's just one of the elements of vagueness in this whole thing.

It would seem to me there is one other basic consideration and that is that this Carrier now comes before the Court—

The Court: Excuse me, but the Injunction is limited to—

Mr. Milledge: No, sir.

The Court: The Court's Injunction?

Mr. Milledge: Well, on conditions of employment, which is the individual agreements, it's broad, that is, it enjoins them from any operation under that. I don't think the non-operating organizations are mentioned in the Injunction at all. Are they, Mr. Shapiro?

Mr. Shapiro: No, I don't think so. The Injunction doesn't specifically mention the non-operating organ-
28 izations, as I recall.

Your Honor may remember that we considered the scope of No. 3 of the Complaint, which raised the Carrier's "Conditions of Employment" of September 1, 1963. Now, those "Conditions of Employment" covered both operating and non-operating crafts or classes. And when the "Conditions of Employment" were enjoined, I think the Injunction also reached any similar provision; so, to that extent, the Carrier was enjoined from resorting to any temporary "Conditions of Employment" which would affect its operating people.

Mr. Devaney: Your Honor, may I say on this, perhaps for clarification:

Number 1, I think that both Mr. Milledge and Mr. Shapiro are overlooking one fact; Number 1, the Complaint filed in this action did identify in the appendices attached to the original Complaint, the Complaint identified the various organizations, all of which were non-

operating organizations which were actual parties, or in effect parties named in the Complaint.

Now, we are not asking in this Application, Your
29 Honor, that this apply to operating personnel. I don't believe by the same token that the Complaint applies to the operating organizations, because they were never made a part. There were never any motions, never any amendments to the Complaint to bring them in as parties. There was testimony, which we objected to coming in, about some of the agreements that the operating unions had but they were never actually made parties. There was no amendment of the Complaint which could have made them parties, and this Application was not intended to broaden the original scope of the Complaint or the Order by bringing in the operating unions, which were never a party to the Complaint.

Mr. Shapiro: It may be that we are discussing a relatively moot point. If the Application by the Carrier does not purport in anyway to affect any operating unions, then, as far as this proceeding is concerned, we needn't debate it further.

Now, we did discuss this issue during the hearing.

Now, the suit was brought by the United States, not by the Unions. One of the Counts was to enjoin
30 the operation under the "Conditions of Employment". The proof in the earlier proceedings showed that the "Conditions of Employment" applied to the operating unions, and the Carrier was directed in the Decree to refrain from continuing in any manner or taking any action under the "Conditions of Employment" of September 1, 1963, except by agreement with the several crafts or classes. This is Paragraph 1(c) of the Complaint.

Be that as it may, as I said just a moment ago, if Mr. Devaney is telling us now that the Application he is presently making is not intended to in anyway go outside of the non-operating crafts or classes, I think that the record is clarified for this proceeding and we needn't go any further.

Mr. Devaney: That's right. And the only question I would have is the one Mr. Shapiro raised, which was completely new to me, that he was contending that this did, that Your Honor's Order applied to operating unions. It was certainly not our impression that it did; and by that reason, we had no intention that our Application would have any application to it. It was assumed we agreed
31 this was involving non-operating unions. Mr. Shapiro agreed that the original Order didn't apply to the operating unions and—

Mr. Shapiro: I hadn't agreed that the original Order didn't apply; only that your Application didn't apply. On that basis—

Mr. Devaney: If you are going to say that the original Order, in your opinion, applies to the operating unions, we will have no choice but to take the position that we must amend our Application and make it applicable to the operating unions. But you are saying that this applies to organizations which were never made a party to the Complaint, they were never made a party to the law suit. There was never any motion made to amend your Complaint to bring them in as parties.

Now, I think, under these circumstances—

The Court: Of course, the United States is a party. The United States was a party.

Mr. Devaney: The United States brought the
32 suit, Your Honor, and it listed in appendices—

The Court: There is an intervention by the non-operating unions only, not any intervention by operating unions.

Mr. Devaney: That is correct.

The Court: So that the non-ops are the only actual parties to the litigation, as Intervenors.

Mr. Devaney: That's correct, Your Honor.

And the appendices, Your Honor, listed the non-operating unions only as being those organizations on behalf of whom the Complaint was filed.

Mr. Shapiro: The Complaint was filed on behalf of the United States. The appendices relate to Counts One and Two of the Complaint.

Count Three of the Complaint was addressed to the "Conditions of Employment" which the proof established covered both operating and non-operating crafts or classes.

I don't know that we are advancing our cause
33 here. If the Application does not apply to the operating crafts or classes, then we needn't debate it further.

If it is intended to apply to them, then I think we've got to consider that as an item in the proof.

Now, the matter is complicated somewhat by the fact that the Brotherhood of Railroad Trainmen, and now I understand the Brotherhood of Locomotive Engineers, have separate law suits relating to these matters. But insofar as the Carrier is seeking to depart from the collective bargaining agreements in line with its "Conditions of Employment" of September 1, 1963, or in connection with its practices that were involved with the Conditions of September 1, 1963, I think the Decree does cover the operating crafts or classes.

We did refer to this in the proof. I think there was an exchange between Mr. Devaney and I concerning the scope of the Complaint at that time. And the examination of Mr. Wyckoff on the first morning went in large part to the operating crafts or classes and its practices relating to the operating crafts or classes. And it was only in
34 the afternoon of May 26th that we turned to the non-operating aspects of the case.

Mr. Devaney: Your Honor, I agree with what Mr. Shapiro says and this is what I stated earlier. The testimony concerning the operating unions came in over objection but I repeat again, and I don't believe Mr. Shapiro has indicated to the contrary, that there was never any attempt to name the operating unions along with the non-

operating unions as being parties against whom relief was being sought.

Mr. Shapiro: The United States—

Mr. Devaney: I was not aware until Mr. Shapiro made the statement this morning, I was not under the impression that Your Honor's Order was intended in anyway to apply to operating unions; and our Application was drawn with that in mind, that we did not intend our Application to make it applicable in any way to the operating unions.

Now, it's only because Mr. Shapiro persists in his view that some part of Your Honor's Order is applicable
35 to the operating unions that I find myself unable to agree unequivocally that the Application does not apply to them.

Mr. Shapiro: Perhaps we could resolve it by stating that, if Mr. Devaney's Application is limited to the non-operating crafts or classes, we wouldn't take this as any concession on his part that Your Honor's Decree applies to the operating crafts. And for the purpose of this proceeding, we could go on.

I do point out that the operating unions did not need to be made parties. Neither did the non-operating unions need to intervene. This was a suit and is a suit by the United States to enforce the requirements of the Railway Labor Act.

The Court: Well, of course I understand that he doesn't make the concession that the operating unions were covered. And you don't make a concession that they were not.

Mr. Shapiro: That's right.

The Court: We can leave that in argument—I mean, in dispute but you are both agreed, it seems to me, that
36 what this Application today is concerned with is entirely with the non-operating unions.

Now, what are the—they are in all seventeen non-operating organizations that are represented, that have contracts with—

Mr. Shapiro: I believe that is correct, Your Honor.

The Court: And eleven of those seventeen are on strike; is that right?

Mr. Shapiro: And the IARE, the International Association of Railway Employees, has a dispute with the Carrier as to whether or not it is operating or non-operating.

The Court: Well, all of these—the IARE is one of the seventeen, isn't it?

Mr. Shapiro: I believe that's right.

The Court: It's one of the seventeen organizations.

Mr. Devaney: Listed in the appendix, Your
37 Honor; I believe it is. As I recall, there is one more listed in one of the groups than there are unions, because the—I believe it's the Redcaps and Porters are listed twice. This is my recollection. I believe that the list does include seventeen.

Mr. Shapiro: The reason for the listing was the Carrier's proposal of September 24, 1963, which I think was served on all of the listed organizations.

The Court: Well, I just—

Mr. Milledge: Judge, if I might say something in clarification.

The Court: Yes, sir. I just don't see that any of these matters dealt with—

Mr. Milledge: The operating crafts?

The Court: —the operating crafts.

Mr. Milledge: Well—

The Court: Any of the findings or—

38 Mr. Milledge: No, the only aspect, Your Honor, is this:

The Government's Complaint asked to have several actions taken by the Railroad enjoined. One of them--and they pertained—one was the September 24, 1963 Section 6 Notice. That pertained to all of the non-operating crafts.

There was a September 25, 1963 Notice that pertained to the operating crafts.

The Court: Yes, sir.

Mr. Milledge: So Your Honor made a ruling on that, that they couldn't put it into effect, which would also determine that the pre-strike agreements are still in effect.

Now, the operating crafts also have a dispute as to the September 25 Notice. The Government did not come in on the September 25 Notice, so that that dispute, that operating crafts' dispute, was not a part of this law suit. The Government came in on the Union Shop thing, which was a uniform notice to many non-ops and one op, the BRT; so Your Honor made a ruling and it actually also
39 affected the BRT although the same ruling had previously been made in the BRT case.

The third thing was the "Conditions of Employment" which was given to all crafts. And I would take it that Your Honor's Injunction on "Conditions of Employment" covered it for all employees.

Now, that doesn't have a negative side, that is, that didn't determine what contracts were in effect with the operating crafts.

I would say though that your Injunction did enjoin the Railroad from operating under the "Conditions of Employment" as to all employees. So, to that extent, the Injunction had a broad aspect. In other words, I would feel that if the Railroad put back the "Conditions of Employment" in, even to some operating crafts, that the Government would be entitled to come in on a contempt proceeding.

The Court: Under 1(c) of the—

Mr. Milledge: Yes, sir. So I think that—

The Court: That is the only ground of argument, as I understand it.

40 Mr. Milledge: Yes, sir.

The Court: Of dispute, is the scope of—

Mr. Milledge: 1(c).

The Court: —numbered Paragraph 1, sub (c) with reference to the "Conditions of Employment".

Mr. Milledge: 1(d) is actually the same, making individual agreements by—

The Court: Well, (c) and (d), then.

Mr. Shapiro: The exchange which occurred between Mr. Devaney and I, I've located it in the transcript, is at pages 84 through 87 of the transcript of May 26th, 1964. And we had an exchange concerning the examination of Mr. Wyckoff on the operating crafts or classes.

The Court: Mr. Devaney objected?

41 Mr. Shapiro: He objected.

The Court: And I permitted you to proceed.

Mr. Shapiro: You permitted me to proceed. I think your permission was qualified; yes, it was, at page 87, after having examined the third Count of the Complaint, which deals with the "Conditions of Employment", you said:

"Well, without accepting Mr. Shapiro's version of the scope of the third Count, I'm going to permit him to inquire along this line and the objection is overruled.

"I don't, by doing that, I mean to imply that I accept without reservation your estimate of the scope of the third Count."

And that was where we stood in the proof when I began to examine Mr. Wyckoff about the operating crafts or classes and the application of the "Conditions of Employment" of September 1, '63 to the operating crafts or classes.

That's the only way the operating crafts or classes

42 came in, through the "Conditions of Employment" of September 1, '63, as applied to the ops' employment.

Mr. Milledge: If I may just wind up my little case here: We wouldn't have this problem if Mr. Devaney's Application had followed the Court of Appeals' opinion, which said a select item-by-item approach and saying what sections of what contract they would have difficulty with in following and what the results would be, and so forth, rather than this shotgun application.

Now, the last thing, Your Honor, is along this line, that this Carrier has shown a disinclination to follow any in-

junctions right along and they have shown a disinclination and we have a pending contempt action, and so forth.

It seems that this is certainly a circumstance when the Railroad comes in and, after nearly two years of operation, says that they are having difficulty complying with these contracts, their disinclination to follow the law or even to follow specific injunctions, should be a factor in weighing their request, the scope of any relief and the duration of that relief, if any.

43 The Court: I might like to hear you specifically, anything else you want to say in reply but specifically about the necessity for further consideration of your Application, No. 7 and 8. You can cover anything else you want to.

Mr. Devaney: Thank you, Your Honor.

The Court: In view of the contention that neither of those applications for modification relate to the operation of the Railroad.

Mr. Devaney: Well, to begin with, Your Honor, as to No. 7, which relates to the seniority rosters, this is the same sort of problem that we had in the Trainmen case. We have not since the beginning of this strike furnished for publication seniority rosters to any of the operating or non-operating unions, for the reason that the employees working during the strike were subjected to intense harassment, abuse, violence, and so forth.

Now, we asked in the Trainmen case that there be a provision on this and, right or wrong, when there was

44 no specific ruling, we felt that it had not been determined.

Now, the same problem is presented here and we have presented the Application with full realization that, if we did not do so, we would face the same contention in this case that, because we hadn't made the Application and we were not furnishing the seniority rosters, we were in violation of the Order of the Court.

Now, the hearing before Your Honor on the 64-40 case has developed at considerable length what the Union's contention at any rate is as to the relationship of seniority rosters as a condition of employment; so that I don't believe we have to go into the detail of that and review it to be able to say without any question at all that it really is a part of the employment conditions that the parties must comply with, and the manner of complying with it therefore becomes a matter which we believe must be determined in this Application.

And because of the action which has taken place in the past, we have here, as we did in the Trainmen case, specifically asked that we be required to give the information only if there is a reasonably protective order that
45 says that it will not be misused.

Now, as to the Union Shop provisions: It is not enough, Your Honor, that these people simply have a requirement in the agreement. If this were all that were involved, we would not have the concern as an employment condition about this Union Shop provision. But this goes much further than this, Your Honor. The present employees have in fact made application for membership in the Union. Not any of those people have been accepted for membership in the Union.

Now, does this mean, Your Honor, that every person must continue indefinitely going through the useless act of making application? Some of the Unions have even instructed people who have been expelled from the Union that you can make application every three months. Well, does this mean that every three months you go through the useless provision of making application, or are those people entitled at some point to be able to rely on the general and unflexible policy that not a one of them has been admitted to membership, that application forms have not even been pro-
46 vided in most instances, so that they will not have to make this request?

Now, the necessity for the request, Your Honor, has also been demonstrated in that the Unions—I don't know whether it applies to any of the non-operating unions or not, but they have similar provisions to the operating unions—and those Unions have clearly demonstrated that one of the techniques of enforcing or attempting to enforce the membership requirement against the people who are presently working is to say that, because you started to work after the strike began, you didn't make application within the thirty-day period, you can't now make application for membership in the Union. Therefore, we aren't going to consider your application. We are going to reject it on that ground.

And this is an attempt, Your Honor, to build up what we believe is a spurious justification for the denial of membership to these people on the asserted ground that "We are denying it because you didn't make the application within thirty days of your initial employment."

Now, for these reasons, we believe that it very clearly has an impact on their employment, not only now, Your
47 Honor, but it will have it in the future because, if these people have an obligation to continue to make application and if the Unions even though they are not willing to take any of them into the Union can in a year, six months, or an indefinite period in the future, come back and say those people must be discharged, this creates a claim, Your Honor. To say that it has, that it's merely a choice by the employer whether he's going to discharge these people simply isn't true, because if they contend and make the request for the discharge of a person, they can and will simultaneously file claims for monetary amounts of earnings on behalf of other people who would have been employed if the discharged non-member had been discharged in accordance with their claim. So this poses a matter which for an indefinite period will continue to present a problem to the Defendant and we feel that it is a very inseparable part of the conditions under which we must oper-

ate. And we believe that the Court of Appeals specifically decided that this kind of a limitation was the proper way to handle the Union Shop question.

In other words, yes, they have an obligation to be-
48 come members, providing membership is available to them, and we are asking now for clarity, for understanding of not only the present employees but of the Defendant that the Union Shop provision either be void and unenforceable as to these new employees—and this would be on an individual Union basis, so that if any Union showed that it was offering or stood ready to offer membership, then these people would have to apply.

Now, if they are not willing to accept these people into membership, we merely say that they should not have the right to continue to insist that these people make these useless applications for membership, and have the right and the opportunity at some time in the future to attempt to have those people discharged and to attempt to bring claims againts the Defendant for monetary amounts involving claims by others who would have had the jobs had the discharge been granted.

Now, if I may reply very briefly, Your Honor, to the statements that both Mr. Shapiro and Mr. Milledge made as to the breadth of and the shotgun approach or the lack of specificity in the Application, may I say that with
49 respect to Item 1, which is the inability to observe the strict craft lines and seniority districts, that this is not a matter that would be uniform that we could say that any section of any particular agreement is the section that we are concerned about, and only those sections. Nor is it necessarily going to be the same from one day to another.

The necessity for crossing the craft lines is simply that we have at the present time fewer people available than we had before the strike, and that the people who are available are not the same individuals with the same qualifications that we had before.

Now, many of the people that we have are highly skilled individuals in certain operations but it does not necessarily mean that they are skilled in all of the operations of that particular craft. And this means, Your Honor, that when there are phases of the work that this person cannot perform, we have to use whatever person is available to perform it, even if it's a member of a different craft working alongside him to perform this particular operation.

The same is true of the use of the exempt and non-
50 exempt supervisors. Since the strike began, as the work force has gradually increased and as the training has progressed, the amount of time that these individuals are spending in performance of scope work has diminished. In many instances, it has diminished very, very greatly but the fact remains, Your Honor, that so long as we do not have individuals who are fully qualified to perform all of the operations that there are many of the specific jobs that these people must perform, because they're the only people available who are qualified to perform it. And this goes to such matters as inspection, as to the performance of various other operations, where there is no one else other than the exempt or non-exempt supervisor who is capable and qualified to perform this work.

And again, this is not a matter that is going to remain uniform on a day-in day-out basis.

Now, as I stated earlier, the Defendant has, since it resumed operations on February 3rd, hired and trained employees as rapidly as it could do so in order to operate.

Now, we are fully prepared to show that we have not diminished our efforts in any respect.

51 Now, Mr. Shapiro made one statement with which I agree and that is that the problems and the conditions under which the Defendant must operate include all of the things that have happened. We couldn't agree with him more on any statement than that. We believe this is true, and since the strike has occurred, a great many different things have occurred to create the strike conditions, to

create the problems as they exist today. For example, the Unions, as is their right during the period of the strike, have attempted to and have influenced and persuaded prospective employees not to come to work. They have handed handbills to people who would have been employees. They have used their efforts on other railroads to prevent or to discourage individuals who might otherwise have sought employment with the Florida East Coast not to work as non-union employees during the strike.

There have been these bombings and the many, many acts of sabotage which have most assuredly discouraged many employees who would otherwise have come to work for Florida East Coast.

52 There have been the campaigns nationwide on the part of the Unions that are on strike to pass out stickers to discourage people from shipping on the Florida East Coast.

There have been efforts on the part of the people within the State of Florida to call on every shipper not to ship by FEC.

There have been secondary boycotts to persuade users and shippers and receivers of freight that their employees should not—

Mr. Milledge: Excuse me.

Your Honor, are we going to have testimony on all this or is this some wild dissertation that we are never going to have any evidence about?

The Court: I'm a little in doubt. These aren't matters that are brought forward by the Application. I certainly am not prepared on this Application to try all these fringe matters going to what has happened. I know there's a strike and you don't have to put any evidence on to show there's a strike. Now, all of this other, I'm not prepared to hear evidence on and I don't see any useful purpose to be served by your making this statement about it, really.

53 Mr. Devaney: It goes to this effect, Your Honor, we do not intend to burden the record by attempting to prove these acts, but I merely say that—

Mr. Milledge: Well, what is the statement about?

Mr. Devaney: If you will be quiet, Mr. Milledge, I'm about to state what the purpose is, if you will bear with me and then make your objection.

Mr. Milledge: I move to have all of his remarks stricken as being matters on which he is not going to put on any proof, or matters of law either.

The Court: Well, he's about to come up, I think, with some reason. Let's hear what it is.

Mr. Devaney: Your Honor, I merely say that these conditions, all of the things that have occurred since the strike began, are a part of the strike conditions. They are part of the circumstances under which the Florida East Coast is attempting to operate, which is also its right to do.

54 Now, we believe that we have, since the Railroad began its operations on February 3rd, made every reasonable effort to hire and to train new people as rapidly as we can. We have done that since February of 1963 and we have continued to do that and we are continuing to do that today. But we do not agree with the proposition that when any Carrier operates under strike conditions that it is required to operate in precisely the same manner that it operated when there were not strike conditions. It simply is not possible to do so and we believe that even if it were not true that we had hired as rapidly as possible, that we had the right to operate and provide the service in an efficient a manner as we can during the existence of these strike conditions.

Now, this takes me to the four or five week suggestion by Mr. Shapiro. Now, the problem, Your Honor, is simply this: That these jobs, many of them, as has been conceded, represent skills and training available only in the railroad industry. Now, we could give many examples in both the shop crafts and in the clerk categories which would illustrate this very vividly, but I think the agreements

55 themselves, which set up in the shop craft agreement the apprenticeship program of a four-year appren-

ticeship program, demonstrate better than I could say in many, many more words the period of training that is required. And as we shall show, the people who are journeymen have simply not been available and Mr. Shapiro concedes that it is virtually impossible for the Railroad to hire journeymen because this would mean people with railroad experience.

Now, to train people within this four-year period, to slot them in where their abilities and experience would justify putting them in the apprenticeship program, but you most assuredly can not train them, Your Honor, no matter how many you can hire, you simply cannot train them in a short period of time to perform this work and, until they are trained and until they are qualified, we simply cannot qualify under the strice provisions of the agreement with respect to these craft lines or to the exempt and non-exempt supervisors not performing some of the scope work.

Now, in the clerk category there are many of the employees, Your Honor, who require extensive training.

56 Now, we cited in the affidavit of Mr. Thornton, I believe, and perhaps Mr. Wyckoff, the Rate and Division Clerk as one of the examples that we are talking about in the clerk category. Now, a Rate and Division Clerk is, Your Honor, the person who takes the charges for carrying a boxcar or freight car and divides up among all of the railroads that have handled it for any part of its journey and apportions the amount of the total freight charge—

The Court: I know what it is.

Mr. Devaney: —to each of those railroads.

The Court: I know what a Rate Clerk is.

Mr. Devaney: Now, this requires, as Your Honor knows, an intimate knowledge of the various tariffs, the various routes, and it requires a long period, which our experience as well as the industry has indicated is two years to train these people.

Now, when the strike began, we had no Rate and Division Clerks. We took a supervisor at the beginning of

57 the strike who had been a Rate and Division Clerk and gave him the full-time job, which he is still performing on a full-time basis almost two years after the strike began, to train Rate and Division Clerks. And we hired three individuals for this position.

Now, this is the kind of problem that you face, Your Honor, in this training and this is what prevents the Railroad from complying immediately. It's what prevents and makes completely impossible the suggestion that Mr. Shapiro has made that there should be any time limitation of four or five weeks.

Now, we don't disagree, Your Honor, that, to the extent that we have the people available, we are continuing to hire and to train these people as rapidly as we can. We are not trying to evade our responsibility. We merely say that you can't comply with the agreement any more rapidly than you can train the number of people that you have available for this training purpose. And that the time, the ultimate time required, must depend upon the training and qualification of the people that you hire.

58 Now, Mr. Shapiro has again inferred that because we required after the strike a high school education that we have foreclosed our ability to hire people who could have performed these jobs but for the fact they did not have the high school education. Now, this inference is simply not correct. And Mr. Shapiro, if he wishes to pursue the matter, we will be glad to have him do so, but we have not been unable to hire people because of this educational requirement who would otherwise have been qualified for the job.

Our limitation, Your Honor, is now and has been, since we resumed operation, the fact that we can only train a limited number of people at any one time and still perform any of the service we are now performing to the public. This limitation has limited the number of people that we could train. It has limited the number of people we can train in the future. It must limit the number of people

that any employer can in any period of time qualify to perform jobs that are essentially skilled jobs.

We're not talking about jobs, Your Honor, that represent the unskilled or semi-skilled categories at this point.

We are primarily talking about the jobs which re-
59 quire a long period of training.

Now, I might also say that we fully recognize that the number of people that was estimated to be required, we simply, as Mr. Thornton indicated in his testimony in May, we simply estimated that we had X-number of people before the strike; we had Y-number of people now; that the difference was 600, and this was where the figure came in.

Now, we are fully prepared to show man-by-man what the actual number is and we are fully prepared to show why the 114 jobs were bulletined rather than a different number.

I merely mention that in passing, Your Honor, to indicate that we are fully aware of the fact that the estimate made back in May was simply an estimate based on what had existed before the strike and what we then had, without going into a consideration of the change in operation that had occurred since the strike actually began.

Now, I might say that, while we will go into it with evidence, Your Honor, a great many changes have occurred in this interim period with respect to new and different types of equipment, which we did not then have but which have since been received and is now in full opera-
60 tion. And this equipment has very drastically reduced the requirements of personnel in many of the categories that we previously had.

Now, this doesn't answer all the problems, Your Honor, because with it it often carries with it the requirement for additional people with particular training, which in effect was not a pre-existent skill at all. Certain opera-

tors are now required that were not used because the equipment did not previously exist.

Thank you very much.

The Court: Do I understand that everybody has agreed that there's no objection to granting the Application in 3 and 6 without any further testimony? Is that right?

Mr. Milledge: Which are they, Your Honor? The apprentice ratio one?

The Court: Apprentice ratio and the bridge tenders.

Mr. Milledge: On the bridge tender, I don't
61 know why the people presently out there can't be operated under the contract.

The Court: All right, I'll require a showing.

Mr. Milledge: And also, on the seniority—

The Court: On 3, you have no objection? I take it there's no objection to 3?

Mr. Milledge: 3 is all right.

The Court: All right.

And despite the suggestion that 7 and 8 be stricken, that 1, 2, 4 and 5 are too vague to proceed on, I'm inclined to and will permit whatever showing the movant wants to make here this morning as to these others and deal with them after we have the evidence rather than in advance.

You may proceed.

There is no need to put any testimony on with respect to Item 3, as I understand it.

Mr. Devaney: Very well, Your Honor. We will
62 not put any evidence on with respect to No. 3.

The Court: In other words, this would have the effect of, with respect to each of the contracts involved, of suspending the trainees' ratio and the age limitation contained in the agreement, so everybody will understand it.

Mr. Devaney: The first witness, Your Honor, will be Mr. I. E. Hamilton.

The Court: I didn't hear you.

Mr. Devaney: Mr. I. E. Hamilton.

I. E. Hamilton.

having been produced and first duly sworn as a witness on behalf of the Defendant, testified as follows:

Direct Examination

By Mr. Devaney:

Q. For the record, please state your name. A. I. E. Hamilton.

Q. And— A. I live at 725 Canal Street, New Smyrna Beach, Florida.

63 Q. And what is your position, Mr. Hamilton? A. I'm General Chairman of the Order of Railroad Telegraphers, Division 87, Florida East Coast Railroad.

Q. Now, you are the same person who previously testified in this proceeding in May; are you not, Mr. Hamilton? A. I believe about that time.

Mr. Devaney: Your Honor, I ask that this be marked for identification. I wonder if it wouldn't be simpler if we continue the numbering of the exhibits following the numbering in the original hearing?

The Court: That's quite all right; wherever you left off, on the—

Mr. Devaney: That's right.

The Court: —Application, you can start and pick up right there, Mr. Clerk. I think the Defendant Railway probably had letters.

Mr. Devaney: Yes. The last one, I believe, Your Honor, for the Defendant was the letter V, as in Victor, so

64 this would be W.

The Court: All right: Identification W.

(The referenced instrument was marked Defendant's Identification Exhibit W.)

The Court: When you run out of the alphabet, start double A and double B, and so forth.

Mr. Devaney: Very good.

May this be marked as Identification Exhibit X.

(The referenced instrument was marked Defendant's Identification Exhibit X.)

By Mr. Devaney:

Q. Now, Mr. Hamilton, I show you this document, marked for identification as Defendant's Exhibit W, which is a letter, dated January 28, 1964.

Will you tell us by whom that letter is signed? A. It's signed by E. A. Armistead, General Secretary and Treasurer, Order of Railroad Telegraphers.

Q. And would you tell us whether or not this shows a copy of the letter to you? A. Yes, it does.

Q. Do you recall receiviing that letter? A. At this late date, I would have to check my files. I'm not certain but I recognize that as an official letter.

Q. Would you examine the document, marked for identification as Defendant's Exhibit X.

For the record, that's a letter dated February 8, 1964, and it's addressed to Mr. C. C. Dempsey. A. That's right.

Q. And by whom is that letter signed? A. E. A. Armistead.

Q. And this shows a copy to you also; does it not? A. That's right.

Q. Now, Mr. Hamilton, I again hand you these two documents, marked for identification as Defendant's Exhibits W and X, and ask if they refresh your recollection as to the action taken by the organization with respect to those two individuals? A. Well, as I explained last May, we decided to wait until the strike was over before we took any action on these people.

Mr. Milledge: Excuse me.

Your Honor, I don't know that these have been offered. I want to object to them. May I make my objection now?

66 The Court: Well, I can understand your objection a little better if I have a chance to examine them myself. Until they are received, I think it's improper to examine the witnesses about them. If you want to examine the witness about them, they have been sufficiently identified. You may as well go on and offer them.

Mr. Devaney: Your Honor, I will offer these at this time as Defendant's Exhibits W and X.

The Court: All right, let me take the objection.

Mr. Milledge: I can explain my objection. I was hopeful that—

The Court: Excuse me just one minute, please.

Mr. Milledge: Yes, sir.

The Court: All right, sir.

67 Mr. Milledge: Our objection, Your Honor, is addressed to relevancy. To understand why these are completely irrelevant depends—they only have relevance in terms of Union Shop agreements. And the exhibit which was introduced prior, the Union Shop agreement, is not in the Courtroom right now but it will be in shortly. But the point is this, that this Union Shop agreement does not require membership. It only requires that a man make application within a particular period of time. If he makes application, it doesn't matter whether he's accepted or rejected. Under this agreement, he is entitled to continue his employment so, whether or not Unions take him or don't, is completely a matter of their choice. It doesn't have anything to do with the agreement itself.

The only provision in the agreement is that a man must make application within the requisite time. Now, he doesn't have to make it over and over again, as Mr. Devaney grossly misrepresented to the Court. The only thing that this agreement requires is that a man make application once to an organization national in scope. And it doesn't make a bit of difference to his employment rights as to whether he is or is not taken into membership. Each man

must make one application within, I think it's 60
68 days, and that's all there is to it.

So, whether or not the organization does take him in or not is totally irrelevant consideration here because Union membership is not required by the Union Shop agreement.

The only thing that is required is that a man make application, tender his dues, and so forth. But as far as the individual is concerned, he just has to make the application. So all this question about discrimination and so forth, they have the right to refuse these men if they've made their application within a certain period of time, but it does not affect the employment rights if application is made.

So all of this, this long business, we have been through it before but it's a misrepresentation of what's legally involved to say that Union membership is required. It's the application by a man within the prescribed time and, therefore, I object to all of this as being irrelevant.

The Court: Yes, sir.

Mr. Shapiro: I will join the objection and point
69 out that, on any of these questions relating to the refusal of a Union presently on strike to accept a non-striking employee as a member during the period of the strike, the only relevant requirement is set forth in Section 2, Eleventh, of the Railway Labor Act, which expressly says that the agreement cannot—well, I'll read it:

"That no such agreement (Union Shop Agreement) shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments uniformly required as a condition of acquiring or retaining membership."

So that you take the agreement and you take the statute together, and it seems to me there is really no problem about discrimination or anything else. If the basic
70 steps have been complied with by the application for employment, if the Union refuses to receive him, then the Union refuses to receive him but the statute and the agreement govern and there is no need to pursue this line of testimony.

Mr. Devaney: Your Honor, I think that the objection is not well taken for several reasons:

In the first place, I agree completely with Mr. Shapiro that Section 2, Eleventh, by its provision says that an agreement cannot be enforced against any person against whom membership is not available on a uniform basis with all other people, but part of the problem here, Your Honor, is not merely that these people are not making applications but, as we shall show, this is only the first step in this procedure.

As we shall show, these people, as Mr. Milledge has just said, they assert that there's an affirmative obligation to make an application within 30 days or 60 days, whatever the agreement provides.

Now, when these people actually make application, they are not being furnished with application forms or they are being met with such provisions as an applica-
71 tion will be receievd only if it is signed by X-number of members of the Union in good standing; so that they are taking the position that because these people, because these hurdles are put up to the application actually being made, that these people because they did not then make the application, that they should be discharged.

See, they are trying to avoid, Your Honor, what Mr. Shapiro has very correctly referred to, that you cannot deny membership to a person unless you offer it to him on uniform terms, so they are trying to bypass that requirement by putting up the roadblocks and making it difficult,

if not virtually impossible, to make the application; and then saying, that because he has not done so, he has not complied with the provisions of the agreement requiring him to make application. They are piously saying that if he had only applied this would either have fulfilled his obligation under the contract or we would have admitted him to membership. They're saying, "We don't have to decide now which way we would have gone but he must only comply with that obligation."

So we say, Your Honor, that this whole matter
72 cannot be sloughed off as being immaterial at this point, because we have the question of the ability of these people to make a normal application and have it either acted upon or rejected so that they then have some protection.

We merely ask that this be put in a form that is clear as to what the present employee must do.

Now, as to these specific letters, Your Honor, this witness testified on May 27th, he testified among other things that no individual who was a member of his Union had had any action taken against him, that everything was going to be deferred until after the strike was over. Now, these and other letters, Your Honor, indicate that action was taken. It indicates that this witness knew the action had been taken and that his prior testimony was not truthful. And we feel that we have the right to examine this witness on the basis of this evidence and establish that his prior testimony was not in accord with the facts—that he knew that action had been taken against various members or former members, and that this testimony to the contrary is not correct.

And we believe that all of this, Your Honor, carries over and is part of the over-all purpose and ob-
73 jective of the Unions here, not only to keep these people out of the Unions but it is to bypass and, under the guise of using the failure-to-apply argument,

attempt to by pass the provisions of the statute, which says that membership may not be denied.

This is why, Your Honor, we feel that it is material. It is why we feel that we must go into this matter. And it is why we feel it is a part of the conditions under which the Defendant and its employees must operate.

Mr. Milledge: Your Honor, this is a very involved area. If we are going to—its doesn't have—we have an Injunction which goes into effect tonight. There is no question but that no one is seeking to have any employees of the Railroad dismissed at the present time. Now, this is a complex matter.

As Your Honor recalls, for instance, the Railroad took the position since last July up until this Injunction was entered that the Union Shop provision was out the window anyway. So of course, if we are going to get into it at this time when it isn't a manpower question, naturally there's going to be all the testimony about what Mr. Wyckoff told the people, they didn't have to apply;
74 it's a very complex area. It's a matter for proof.

There is no reason at this time for Your Honor to be required to suspend or make any ruling one way or the other on it because this provision is not a self-executing one. The organizations must request dismissal and, if that is done at any time in the near future or at any time, then that will be a matter to be decided. But even if it's a matter that should be decided presently as opposed to some months from now, it's a vastly complex factual area which does not have any relationship to whether this—to any present man power requirements and I think we ought to have another hearing on it, if it's Your Honor's feeling that it should be resolved in this fashion; but it's a vastly complex matter which isn't presently in any critical stage.

Mr. Devaney: Your Honor, may I say in response to that that this merely bears out the contention that we made and our sincere belief that the Court of Appeals attempted

to deal with this without the necessity for all of the evidentiary matters, because none of them lead anywhere.

75 There is only one requirement that is involved here: If the Union has a Union Shop agreement and if it wants to enforce it, then it must make membership available to all the employees without discrimination. This is precisely what we believe the Fifth Circuit said in its opinion in the Trainmen case. And this is all that we are asking be included here, and it does not require a complex or lengthy evidentiary hearing to require what the statute already requires them to do.

We merely say that until they are willing to demonstrate that people who are working during the period of the strike are going to be admitted to membership that they simply not have the right to enforce their Union Shop agreement against those people.

Now, against their members who are already members, against anybody else who is accepted into membership, this would have no application whatever. We believe that this is the reasonable, the direct, the most logical way to deal with the problem, and this is why we have asked for it. And we believe that the Fifth Circuit intended that this be the way of dealing with the problem, without having to go into these lengthy evidentiary matters

76 which really do not take you anywhere anyway. The statute requires, in my judgment, that there be no discrimination and, if the Union wants to enforce that agreement, I see no reason why or how they could really object to a provision which says nothing more than the statute requires, namely, if you are going to enforce it, you must not discriminate against the people who are now working. And that's all we have asked.

The Court: I can't for the life of me see where this matter involves any man power question or any emergency strike condition that you need to ask at this time to have relieved. As is pointed out, if at any time there is the

claim that you are working a man in violation of the Union Shop agreement, there is a hearing, isn't there?

Mr. Devaney: Not necessarily, Your Honor. There would be a claim by—the normal procedure is to file a claim with the Company, which is progressed to the Adjustment Board, claiming wages which would have been earned by the person filing or on whose behalf the claim is filed, if the person in violation of the Union
77 security agreement had been discharged in accordance with the Union's request.

Now, my point is simply this, Your Honor, that I don't contend—and I agree that this is not something that—

The Court: Well, the Court of Appeals has left you the right to come in on an item-by-item basis and say—

Mr. Devaney: That's right.

The Court: —and say, "We've got to be relieved in this particular or we can't operate, and it's brought on by strike conditions."

Mr. Devaney: That's right, Your Honor. And we say that, as to this, it is not of an emergency character that is going to require action today; but the same thing will be true tomorrow and tomorrow, as long as the strike conditions continue and as long as these people in fact trying to enforce that part of the agreement that requires that application be made within a specified time, and
78 then are putting up roadblocks that make the application, so that later they are, and already have made the assertion, Your Honor, that they are asking the discharge and the claim will be on the basis not that membership was denied but rather that application was not made to the Union.

The Court: Well, these two apparently—

Mr. Devaney: These two—

The Court: These two that are offered here are returnees, not—

Mr. Devaney: They are returnees, Your Honor, and this goes more to the credibility of this witness than it does to

the second matter that I was reaching, namely, the question of the application. But I think that the question of the credibility of the witness whose prior testimony, beginning at page 484, 485 and 487 of the May hearing, he testified that no action had ever been taken by his organization against any member who had returned to work. He said on page 484, for example:

79 "It doesn't say that. He would later be given a chance to clear himself, or whatever is necessary. He will be given a fair and impartial investigation.

"In our case here, we are holding all of those in abeyance until the strike is over, and no decision has been made on them.

"Q. You mean you are going to try them after the strike is settled?

"A. No, I didn't say that."

And again he said:

"I said we are just leaving that matter in abeyance."

And this continues over and over that:

"No. we haven't taken any action against them."

When, in fact, they were returning their money as dues and telling them that they were no longer considered members.

Now, this is—

Mr. Milledge: That doesn't affect their employ-
80 ment rights. That wires them in for all time. It has nothing to do with our problem here.

The Court: I can't see that it does.

Mr. Devaney: Well, I don't say that it does have anything to do with the Application, Your Honor, but I do say that it has semething to do with the credibility of the witness who testified that no action had eved been taken, when, in fact—

The Court: We are not going to relitigate this May matter and that's not the purpose of this hearing.

Mr. Devaney: No, it isn't, Your Honor.

The Court: You misconceive it to an extent, to my mind. What I have done in trying to follow what the Court of Appeals did in the Trainmen case is to say to you, "If the thing pinches too much, you've got a right to come in and show me on an item-by-item basis that it does so." Not to retry the whole proposition. I don't know why I'm particularly interested now, having heard Mr.

81 Hamilton's testimony in May, in having his credibility attacked months after the hearing and thirty days after my Order based on the hearing. We would be here all winter on this thing.

The objection to these two exhibits is sustained. They are for identification only.

By Mr. Devaney:

Q. Mr. Hamilton, since you testified in May, have any of the employees presently working for Florida East Coast made application for membership in the Telegraphers Union? A. Let me explain it this way:

We have had some requests for application blanks.

Mr. Milledge: Excuse me, Mr. Hamilton.

Your Honor, this is—I don't know whether Your Honor meant to rule on the whole issue or not but this is, I think it's implicit in your ruling that the Union Shop question does not presently involve a man-power problem and consequently we would object to this whole inquiry, which does not have any present man-power impact whatsoever.

Mr. Shapiro: We join the objection, Your Honor.

82 It seems to me it has already been demonstrated by Mr. Devaney's remarks that what's involved here is some sort of anticipatory ruling on what disputes might subsequently arise because someone files a claim against the Railroad, Your Honor.

There is a forum that has been provided for that and there's no reason why there should be any anticipatory ruling. This is not the kind of shoe which pinches the Railroad's operation and I don't think that is a line which can be pursued.

The Court: The objection is sustained.

Mr. Devaney: May I make a proffer of proof, Your Honor?

The Court: Well, if you will make it by a statement, rather than bringing it out question and answer with the witness.

Mr. Devaney: I understand, Your Honor.

The Court: Make a statement of what you seek to prove.

Mr. Devaney: May I inquire, before doing that,
83 Your Honor, I assume that the ruling on this question of application and membership in the Telegrapher's Union, do you intend this to apply to all of the other Unions?

The Court: Yes, sir. Yes, sir, I would be glad to have that understood and it's almost to my mind, without saying definitely, that it does, it almost amounts to saying that I won't take any showing under your numbered 8. There may be—I say it almost amounts to that just simply to be cautious because there may be something under this 8, something else that could be shown, but this and similar testimony from this and other witnesses with respect to this and other crafts, I would object if it's proffered.

Maybe that takes care of your proffer, I don't know.

Mr. Devaney: No. The reason I asked, Your Honor, was whether I should limit the proffer to the Order of Railroad Telegraphers or whether it might save time if, in recognition of this, I made the proffer on behalf of the various organizations and tender the material in support of the proffer.

84 The Court: The ruling is down to cover it. The only difference, as far as I'm concerned at this point, is in the names of the organizations.

Mr. Devaney: That's correct.

May this be marked for identification as Defendant's Exhibit Y.

(The referenced material was marked Defendant's Identification Exhibit Y.)

Mr. Devaney: And this would be Z.

(The referenced material was marked Defendant's Identification Exhibit Z.)

Mr. Devaney: Your Honor, as soon as we get this one group of documents separated, I would like to proffer at this time Defendant's Exhibit Y, which consists of 61 letters of application to the various organizations.

Defendant's Exhibit Z consists of 6 additional letters of application.

We would show, if permitted to do so, that none of these individuals have been admitted to membership; that none of them have been furnished with applications for membership, with one or two possible exceptions, and the
85 one or two exceptions where the individuals in fact made an application, that no action has been taken by the Local Union on the application.

Now, we offer these in support of the testimony, which was objected to and which Your Honor has sustained, dealing with the over-all question of the applications by the present employees for membership and the fact that they have not been granted membership in the Union and that their applications, or requests for applications, have not been granted.

Now, these Unions, the various letters include, if not all, certainly include most of the Unions involved in this action, including the Brotherhood of Railway and Steamship Clerks, the Carmen's Union, the IAM, the various other organizations, and including the Order of Railway Telegraphers.

I offer at this time Defendant's Exhibits Y and Z.

The Court: That's a part of the general proffer?

Mr. Devaney: Yes, it is, Your Honor. And I assume for the record you deny the proffer?

86 The Court: Well, I want you to complete your proffer.

Mr. Devaney: I have completed that part of the proffer, Your Honor.

The Court: It's excluded on the objections previously made and the previous ruling.

By Mr. Devaney:

Q. Mr. Hamilton, does your Constitution contain a provision in it for an application form?

Mr. Milledge: Excuse me.

I object, Your Honor; same objection. It's all the same area.

Mr. Devaney: Your Honor, this is not quite the same area.

The Court: All right, go ahead and complete your question and let me understand it.

Mr. Devaney: That question is complete but it does not go to the question that you had previously ruled upon. There is another purpose.

87 The Court: I misunderstood you. I thought something was hanging up in the air.

Read the question please, Mr. Sheridan.

The Reporter: "Mr. Hamilton, does your Constitution contain a provision in it for an application form?"

The Witness: I know what you're getting at, Mr. Devaney.

The Court: Wait a minute. Wait a minute, Mr. Hamilton, I'm sorry.

The objection is sustained.

Mr. Devaney: May I say, Your Honor, that what we are leading up to, and I can ask a further series of questions but perhaps, if I state what the purpose is, you would reconsider your ruling and permit questions to go to this.

The Court: All right, go ahead.

Mr. Devaney: But the purpose of this, Your
88 Honor, is that I wish to inquire as to whether or not the Order of Railroad Telegraphers has a provision in its Constitution for an application form.

Now, the individuals, or at least some individuals, who have made application to the Order of Railroad Telegraphers have not been furnished a form, but instead have been asked for a lot of detailed information. Now, we feel that this indicates, as we have contended all the way through, Your Honor, this is merely a subterfuge to obtain information for the harassment of the employees who are presently working and that this demonstrates again that the use of the names of the seniority rosters, and so forth, should be limited by Order of the Court to the proper and legitimate policing of collective bargaining agreements and not for the harassment of the present employees.

Now, this is the purpose of this line of inquiry, not the fact of membership itself.

Mr. Milledge: Your Honor, if I may be heard on this. This is a typical, ridiculous statement by Mr. Devaney.

The seniority rosters contain only two things: Names
of people and their dates. They don't contain
89 addresses or anything else.

All these people that his proffer shows, 60 odd, sent in an application, well that contains their name and I'm sure it contains their address and a lot of other information. So trying to go into this thing on the basis of seniority, what information might be on a seniority roster, is a fantastic representation to this Court, when a seniority roster, all it does,. it has a man's name and his date.

The proposition that the seniority roster has something to do with harassing employees is just too ridiculous, and particularly going into it along this line. These people have already given their names, their names are the only thing that would be on the seniority roster anyway; so this inquiry must have—it doesn't have any relevant purpose in this proceeding.

The Court: I think I've already ruled on this point. Perhaps I should have ruled on your appeal to modify it, which is denied.

Mr. Shapiro: Pardon?

90 The Court: I say perhaps I did leave something open. I told Mr. Devaney that I would let him show me why the prior ruling should be modified. It's adhered to. I don't—there's nothing to be concerned about, Mr. Shapiro.

Mr. Milledge: The prior ruling is adhered to.

The Court: I'm just trying to make a clear record for Mr. Devaney on this line of proof.

Mr. Devaney: These, Your Honor, which I will have marked at Defendant's Exhibit—

The Clerk: AA.

Mr. Devaney: —AA, consist of a series of applications by individuals for application forms in the Order of Railroad Telegraphers.

We would show, first, that the application form is required by the Constitution of the Order of Railroad Telegraphers; that they have consistently used such an application form; that these employees presently working

91 for the Defendant made application for the employment form; that they were not furnished the application form but, instead, the Order of Railroad Telegraphers, by Mr. Hamilton, replied asking for information which is not normally required and which, under the Constitution, does not have any relevance to their membership at all, including such matters as the training they have had in the capacity of the job they are holding; that this information itself is a further attempt at avoidance by the Order of Railroad Telegraphers to provide the application form. It is a further attempt to harass these employees by requiring the divulgence of information which has not the slightest relevance to their application. It is the imposition of conditions which were never required of applicants in the past. And that this entire procedure is merely

another of the moves by the Unions to deny actual membership to these people, and that it further demonstrates that the use of information concerning the present employees is not desired for legitimate purposes but can only have an improper motivation behind it. And that this is why we have asked that the furnishing of any information divulging the names of present employees be subject
92 to this reasonable limitation that it not be misused.

Now, we would further show, Your Honor, as part of this offer that this use of this questioned reply has been broadened and is used by other Unions, including the Brotherhood of Railway and Steamship Clerks and is used by the Brotherhood of Railway Carmen of America, where the same questions, apparently a form letter approach is being used by all of the different non-operating unions as a basis for response to applications for membership; that this is not in accordance with the Constitutions of those or any organization; that each provides for the uniform membership application; that when it was requested by present employees, they were not furnished this membership application form but instead received this letter in the form of a questionnaire asking for additional information before they were even furnished the application form.

Now, if I may, Your Honor, these will consist of a series of letters, which I have only partly assembled for presentation. If I may pull them together and have them marked as AA or, if you would like, I will be glad to complete this assembling at this time.

93 Would you like that I go ahead now or should I proceed and assemble these and give them to the Clerk when we break for lunch?

The Court: Well, whatever you want included in the proffer, why you'd better get it to him some time. I'm going to exclude it whenever you get it ready; it's excluded.

Mr. Devaney: I understand.

The Court: You put it in whatever form you want, whatever is the most convenient and the most time-saving at this point.

Mr. Devaney: All right.

As merely suggesting—would there be any objection to my doing this, getting these althogether when we break for lunch?

The Court: I think you have indicated the general nature of them and—

Mr. Devaney: Correct.

94 The Court: —you can certainly put them in form and the Clerk can mark them for identification during the noon recess.

I gather, as you go along, that this is beamed primarily at numbered Paragraph 8, which extends over or slops over into 7 occasionally.

Mr. Devaney: That's correct, Your Honor; that's quite correct.

The Court: It directly or indirectly is intended to support the Application in No. 7.

Mr. Devaney: That's correct, Your Honor.

By Mr. Devaney:

Q. Mr. Hamilton, have you called on shippers of freight on the FEC to cease doing so during the period of the strike?

Mr. Milledge: Excuse me. I object.

If he had done it, it would just mean that they could then use less man power. It would really help them in

95 this proceeding, but I—that's frivolous but I do object. It doesn't have anything to do with the man power to handle the present freight.

The Court: What's the purpose of this, Mr. Devaney?

Mr. Devaney: This is part of the establishment of the employment conditions, Your Honor, that Florida East Coast is now operating under. I think it goes to the question that the Unions have exercised every means they could

to discourage shippers using Florida East Coast, to discourage employees making application; but these are part of the strike conditions under which we are now working and it's part of the problem that we face and why we cannot operate in the same manner today in all respects that we could prior to the strike.

It means that it clamps down on the number of applicants that we have. It means that a great deal of the shipping which would otherwise be available to Florida East Coast is not available to us because this action is taken against the Florida East Coast.

The Court: Objection sustained.

96 Mr. Devaney: No further questions of this witness, Your Honor.

Mr. Milledge: No questions.

Mr. Shapiro: No questions.

The Court: Come down, Mr. Hamilton.

(Witness excused)

The Court: As far as I'm concerned and the record may show that, if other Local Chairmen or responsible heads of these labor organizations were called and you sought to elicit the same proof from them that you did from Mr. Hamilton, I would make a similar ruling. I hope that is broad enough to save going through any further steps along this line.

Mr. Devaney: All right, very well. I think that will certainly cover that.

Do you wish to call another witness or adjourn for lunch at this time, Your Honor?

The Court: Well, I'm prepared to proceed for a few minutes.

97 Mr. Devaney: Very well.

The Court: I will want to stop in a few minutes.

Mr. Devaney: Mr. Webb.

Howard E. Webb.

having been produced and first duly sworn as a witness on behalf of the Defendant, testified as follows:

Direct Examination

By Mr. Devaney:

Q. Would you state your name, please. A. Howard E. Webb.

Q. And by whom are you employed, Mr. Webb? A. Florida East Coast Railway.

Q. And what is your position? A. Superintendent of Communications and Signals.

Q. And how long have you been employed by the Florida East Coast? A. A little over a year.

Q. And by whom were you employed prior to that time? A. Louisville and Nashville Railroad.

Q. In an equivalent capacity? A. Yes, sir.

98 Mr. Devaney: I ask that this be marked for identification as Defendant's Exhibit BB.

(The referenced material was marked Defendant's Identification Exhibit BB.)

By Mr. Devaney:

Q. Mr. Webb, I hand you the document marked for identification as Defendant's Exhibit BB. Would you tell me what the headings on this document, marked for identification, state and what these various headings purport to show?

Mr. Milledge: Objection. There is no way for us to know even what we are dealing with here. Either the document is admitted or it is identified admitted or—

The Court: Well, what is it? Some kind of a chart?

Mr. Devaney: Yes, Your Honor.

The Court: Sir?

Mr. Devaney: It is a breakdown of employees, that's correct. If you want me to identify it, I'll be happy to.

99 The Court: Well, I'm sorry. Let the witness go on and identify it sufficiently to identify what it is and then make a tender, so that he can examine it to see if there is any objection.

The Witness: This shows the pre-strike freight and passenger employees; passenger employees only; freight employees only; in manufacturing of bearings; employees in freight only, on November 2nd, 1964; the number of bulletined positions, November 2nd and November 3rd, 1964; the reduction of requirements; additional needed—if first bulletined filled or perishable season; total now and bulletined or to be bulletined.

By Mr. Devaney:

Q. And the column on the left indicates the different departments of the Florida East Coast, does it not? A. That is correct.

Q. And is the third one the department which you are in charge of? A. Yes, sir.

Q. That is the Communications and Signals Department? A. Yes, sir.

Q. Now, were the figures as to that department
100 prepared by you or under your direct supervision? A. Under my supervision.

Q. Now, as to the other departments, do you have any first-hand knowledge of the preparation of those items, or were those prepared by other persons? A. I have no knowledge of how they were prepared, or prepared by other people.

Q. In other words, you are familiar with those figures relating to the Communications and Signals Department? A. That is correct.

Q. Now, Mr. Webb, as—and I believe that the date here is December 31, 1962. Could you tell us how you determined the number of employees in the Communications and Signals Department prior to the strike, as of December 31,

1962? A. We obtained the payrolls from the Accounting Department and took that from the actual time sheets.

Q. Now, I noticed that there were no employees in the Communications and Signals Department allocable to passeneger business; is that correct? A. It's so indicated on this chart.

Q. And why was that, Mr. Webb? A. Well, they
101 serve for both freight and passenger. It would be difficult to separate to which department or which service that they tendered their services to.

Q. How many—

Mr. Shapiro: Your Honor, I object at this time to the line of questioning.

Has this been introduced in evidence yet?

The Court: No. it hasn't been tendered yet. I think he was simply trying to establish the authenticity of it and, as I understand it, it's a chart made up in part from some figures supplied by this witness.

Mr. Devaney: This is correct, Your Honor.

The Court: Well, show it to counsel. Maybe they would agree with you as to the correctness of it. Apparently you are going to have to call somebody from each of the operating departments to prove the validity of its, unless you—

Mr. Devaney: That is correct, Your Honor.

The Court: —can agree on it. I don't know; may-
102 be you can work out an agreement.

The purpose of it is to contrast pre-strike and present numbers of employees; isn't that it?

Mr. Devaney: That is correct, Your Honor.

The Court: In each of the operating departments?

Mr. Devaney: That is correct.

If you care to look at a copy of it, Your Honor, I have an extra copy. (Tendering instrument to the Court)

The Court: Thank you.

Mr. Milledge: Judge, if I might make a suggestion.

The Court: Yes, sir.

Mr. Milledge: I have most of the General Chairmen of the organizations here. Of course, I don't have any independent knowledge but they could, particularly if we had a few more copies of it.

103 The Court: Yes, sir. I think that you might be prepared to stipulate that—

Mr. Milledge: Yes, sir.

The Court: —that the other department heads would give testimony similar to that of Mr. Webb with respect to the authenticity—the accuracy, rather, not the authenticity but the accuracy of the figures and their source, being original business records of the Company. There are eight departments that you would have to have similar testimony from, since it's a kind of composite exhibit.

Maybe you can talk to your people at noon and be prepared to take a position on the matter.

Mr. Milledge: Yes, sir.

The Court: I think you would represent that—

Mr. Devaney: Indeed so.

The Court: —you've got other people here who would testify to the correctness of the figures?

104 Mr. Devaney: Department by department.

The Court: Yes, sir.

Mr. Devaney: It would be established by other witnesses that this is the person who has the direct—

The Court: Well, I sure hope we can avoid that. Maybe you can talk to your people. And it may be a good place to break off.

Mr. Milledge: Your Honor, if we could do this just so I understand, just by way of voir dire, if I might ask this witness—

The Court: All right.

Mr. Milledge: —what the different headings mean, so I'm clear in my own mind.

The Court: All right, certainly. I think that may save some time.

105 Voir Dire Examination

By Mr. Milledge:

Q. Your first column over here at the top, "Pre-Strike Freight & Passenger", the numbers are the numbers of men, scope— A. Employees.

Q. Scope employees? Is it scope or non— A. Scope employees.

Q. Does that include supervisors or not? A. No supervision.

Q. Does that figure include non-exempt foremen, that is— A. No, let me testify to this extent, that the non-exempt foremen—you mean like a foreman of a gang?

Q. Correct. A. That includes those.

The Court: Like a foreman, what, Mr. Webb?

The Witness: Of a gang.

By Mr. Milledge:

Q. That is, he is still a Union man but— A. He's still a Union man.

Q. —but he's in a supervisory role. All right, it
106 includes those people? A. (Nodding head in the affirmative)

Q. What is this third column—or fourth column, "Mfg. Bearings"? I didn't catch that. That's not your department? A. No, it's not my department but I would assume that was people that worked on the bearings of cars and such.

Q. Now, these first four columns are all the date December 31, 1962? A. Yes.

Q. The fifth column is a fairly recent date? A. Yes, November 2nd, '64.

Q. All right. The next column is what? The number of jobs bulletined on that date? A. That's correct.

Q. Then your next column is "Reduction of Requirements". What does that mean? A. That means the number of—in other words, these positions bulletined would

bring us up to what we consider our requirements. Your reduction of requirements is the number of employees.

Let me explain that again: That is the difference between—or the number of jobs that would be reduced
107 below what we had prior to the strike.

Q. In other words, that column that ends up "317", that's 317 less men— A. Less employees.

Q. —than in the pre-strike circumstance? A. That's correct.

Q. Now, let me just go back a second to that "Bulletined". That's the sixth column.

Are those jobs that were bulletined in addition to Column No. 5? In other words, you show 11/2/64 column— A. That a certain number of positions were bulletined.

Q. Yes, let's just— A. I mean 5 is the number of employees on 11/2/64.

Now, you want the—

Q. Is 6 the jobs that— A. The positions that were bulletined.

Q. Well, do those include some of those in 5, or are they all new positions? A. Those are all new positions.

Q. Now, what is that eighth column, entitled "Additional Needed"? What does that have to do with it? Do you know? A. I assume that is if during the perishable season and if the bulletins—the first bulletins, those covered
108 by the sixth column—were filled, the additional positions would be bulletined as shown in the eighth column.

Q. So your understanding of the eighth column is additional personnel needed for the perishable season? A. Yes.

Q. And what is the ninth column a total of? A. That shows the number that have been, that are now bulletined or will be bulletined.

Q. It looks like—is it a total of columns 6, 7 and 9—5, 6 and 8, rather? Is that what that is? A. Which ones did you say?

Oh, that is a total now, that is the total of 5, 6 and 11—I mean, 8, rather; it's 11 men there.

Mr. Milledge: I think I can interpret it now, Your Honor.

The Court: All right. This may be a good point to break off.

Mr. Devaney: Your Honor, before we do, may I take about two minutes and, strictly for the record for identification, read the letters that constitute Defendant's proffer of AA?

The first is a letter dated November 21, 1964,
109 addressed to Mr. Lige Murray.

The Court: Unless you insist on it, I don't know of any reason.

Mr. Devaney: Well, the only reason is that they are loose and there are several letters and I thought perhaps the parties, for ease of being able to identify the contents of the exhibits, that it would be helpful to them, Your Honor. Otherwise, I will not do so.

The Court: Well, rather than read them in the record, I suppose you have somebody over there in the office who can list the letters; just list them and attach a list of them to the exhibit.

Mr. Devaney: Yes, that can be done, Your Honor.

The Court: All right. I just hate to take the time while you read all those named.

Mr. Devaney: All right, we will do that.

The Court: I have another matter to take up for
110 about five minutes at 2:00 o'clock, so let's say 2:10, Gentlemen.

Mr. Devaney: Very well.

(. . . At 12:35 o'clock p.m., on Monday, November 30, 1964, the Court adjourned to be reconvened at 2:10 o'clock p.m.)

(. . . At 2:25 o'clock p.m., on Monday, November 30, 1964, pursuant to adjournment of the preceding session, Court reconvened and the following further proceedings were had:)

resumed the witness stand and further testified as follows:

The Court: Gentlemen, have you reached some agreement about this exhibit?

Mr. Shapiro: Your Honor, the Government feels, first, that this should properly be introduced by the official who prepared it; secondly, that insofar as the figures represent the personnel situation in the several departments of the Railroad, that they should be explained by the
111 department heads. There is no way we can cross-examine these statistics or know what underlies them. We just don't have access to that kind of information and, without the department heads available to tell us what they mean and why they are what they are, I don't see how we can proceed with it.

The Court: Well—

Mr. Milledge: Our position is the same.

In and of themselves, these figures don't say anything in regard to these specific problems before the Court. And they only say something in terms of what's represented to be the problem in the particular department, and each department is extremely different.

The Court: Well, I hope I may understand that neither you nor Mr. Shapiro object to stipulating that we have—that the Defendant-Movant has the appropriate heads or sub-heads, of the seven or eight departments here, prepared to testify to the correctness of the figures in the same way that Mr. Webb has, and we can save that.
112 Now, if they are here and remain here and Mr. Shapiro and you will call for individual ones that you want to cross-examine about these figures, I think that might save us some time.

Mr. Shapiro: I think, on that condition, the Government could accept this.

The Court: If you will just keep them here, please, sir, and—

Mr. Devaney: We will do that.

The Court: I'm going to receive the proffered exhibit as BB in evidence. It may very well be, as you suggest, that it means nothing without some explanation; that, I don't know. Maybe it can be made clear, with one man testifying about it.

This is all kind of, particularly in Mr. Wyckoff's sphere or his department.

Mr. Shapiro: I would like to ask—

The Court: Maybe Mr. Wyckoff could cover the
113 whole thing, rather than cross-examining each one of these. I don't know, but, anyhow, the paper, for what it is worth, is received as to the whole thing; and unless they are called for specifically, I don't require that you produce each of the several department heads. If they are called for to be examined about something on the exhibit, why we will permit that to be done.

Mr. Devaney: Very well, Your Honor.

Mr. Milledge: Is it represented that each of the department heads is here?

The Court: That's what I understood, that they were either here or available.

Mr. Devaney: We have individuals here who have the knowledge and information.

The Court: Why don't we just go down this list and I'll make a note on this extra copy I have.

The Motive Power Department?

Mr. Devaney: Mr. Hales is here.

114 The Court: All right, sir.

Maintenance of Way?

Mr. Devaney: Maintenance of Way, Mr. Davidson is here.

The Court: We have Mr. Webb on for Communications & Signals.

Mr. Devaney: Correct.

The Court: He's on the stand now.

Transportation?

Mr. Devaney: Transportation Department, that would be handled by Mr. Thornton and Mr. Wyckoff.

The Court: A little louder.

Mr. Devaney: Mr. Thornton and Mr. Wyckoff would cover the Transportation Department.

The Court: I see.

Mr. Devaney: The Accounting Department, Mr. Wyckoff.

115 The Freight Traffic Department, Mr. Thornton.

The Personnel Department, Mr. Wyckoff.

The Stores Department, Mr. Hales.

The Court: Hayes?

Mr. Devaney: Hales, H-a-l-e-s.

The Court: The same man?

Mr. Devaney: Yes, Your Honor.

The Court: All right, sir.

Mr. Shapiro: Your Honor, I wonder if I might ask Mr. Webb one or two questions?

The Court: Certainly; if you are finished with him on direct.

Mr. Devaney: I have not, Your Honor.

The Court: All right, why don't you save that.

116 Mr. Devaney: If you have some on voir dire, you may go ahead.

Mr. Shapiro: This is really only as to the preparation of the document.

The Court: All right, let's take it now then in connection with the exhibit.

Voir Dire Examination

By Mr. Shapiro:

Q. Mr. Webb, did you prepare this document? A. Only my portion of it, or furnished the information which was used in the preparation of it.

Q. To whom did you furnish that information? A. The Director of Personnel, Mr. Wyckoff.

Q. Did Mr. Wyckoff prepare the document as a whole? A. I assume he did; I can't answer that question.

The Court: He got your part of it from you?

The Witness: That's right.

By Mr. Shapiro:

Q. And the figures that you have come from the payroll records of your department? A. That is correct.

117 Q. Do you maintain the payroll records for your department? A. No, the Accounting Department maintains the records but we can secure the records from them any time we need them.

Q. Were the statistics that are on here furnished you by the Accounting Department? A. They furnished us the time rolls and we took the figures off of them.

Q. You examined the records of the Accounting Department? A. I examined the records and got those figures that appear on there.

Q. I see; thank you. A. Yes, sir.

(. . . Thereupon, Defendant's Identification Exhibit BB was received and filed in evidence.)

Mr. Devaney: Your Honor, I have prepared, as suggested, a list of the letters constituting Defendant's Exhibit Z and Defendant's Exhibit AA, which I ask the Clerk to attach to each of those exhibits.

The Court: All right, sir.

118 Mr. Devaney: To complete the—

The Court: Did you make an extra copy of that by any chance? Do you have an extra copy?

Mr. Devaney: An extra copy of that? I believe I have.

The Court: I was going to suggest that maybe you deliver that to Mr. Shapiro. Then he will have a record of exactly what's in the exhibits.

Mr. Devaney: I believe I do have one extra copy, Your Honor.

The Court: All right.

Mr. Devaney: To complete the proffer relating to the same matters, I have noticed that there were three items which were not previously included in the proffer and I would like to have them marked for identification at this time as Defendant's Exhibit CC.

(. . . The referenced material was marked Defendant's Identification Exhibit CC.)

Mr. Devaney: This is a letter, dated November 18, 1964, and it is a letter from the Brotherhood of Railway
119 and Steamship Clerks addressed to Mr. M. R. Keefe, in which the Brotherhood of Railway and Steamship Clerks ask for this information in letter form. He responded to this.

And we would further show that Mr. Keefe's application was neither granted nor was he furnished an official application form.

I would like to have marked for identification as Defendant's Exhibit DD a letter, dated October 29, 1964, and attached to that—this is addressed to Lloyd G. Taylor from Mr. John H. Hornsby, Sr., and it is addressed to the International Association of Machinists, and attached to that is an application form. Now, the International Association of Machinists did furnish an application to this individual. He submitted it and has not been admitted to the Union.

(. . . The referenced material was marked Defendant's Identification Exhibit DD.)

Mr. Devaney: And I would like to have marked for identification as Defendant's Exhibit EE a letter to Mr. D. S. Cooper, Financial Secretary-Treasurer of the Brotherhood of Railway Clerks. The first letter is dated Novem-
120 ber 16 and is from Anna M. Wright. Prior to that is a letter of August 14 from Mr. Cooper to Anna M. Wright; a letter of July 24 to Mr. Cooper from Anna Wright; a letter of April 13, 1964 to Anna M. Wright from Mr. Cooper; a letter of March 16, 1964 to Mr. Cooper from

Anna M. Wright; a letter of March 6, 1964 to Miss Anna M. Wright from Mr. Cooper; a letter of March 3, 1964 to Mr. Cooper from Anna M. Wright; a letter of February 18, 1964 to Anna Wright from Mr. Cooper; a letter of September 13, 1963 to Anna M. Wright from Mr. Cooper; a letter of August 19, 1963 to Mrs. Scanlon, Recording Secretary, Care of Mr. Cooper, from Anna M. Wright; a letter of August 12, 1963 to Miss Anna Wright from Miss Scanlon, and a letter of August 8, 1963 addressed to Mr. R. W. Hayes, President of Lodge No. 751, signed by E. W. Pollard. All of these constitute for identification Defendant's Exhibit EE.

These are all letters going from the original expulsion of Anna Wright through a whole series of applications for reinstatement. And we would show, Your Honor, that she was rejected for reinstatement on each occasion.

And in accordance with the provisions of the Con-
121 stitution of the Brotherhood of Railway Clerks, she has periodically, I believe every three months, applied for readmission and she has not been readmitted.

I offer the exhibits marked as DD, CC and EE into evidence.

The Court: This is an addition to the earlier proffer, and they are excluded under the prior ruling.

By Mr. Devaney:

Q. Now, Mr. Webb, on Exhibit, Defendant's Exhibit BB, do you have a copy of that before you? A. No, sir.

Mr. Devaney: May I have that again, please?

(The Clerk tendering instrument to Mr. Devaney)

By Mr. Devaney:

Q. Now, do I understand that, as of November 2nd, 1964, you then had 11 employees in your department? A. Yes, sir.

Q. Did you bulletin an additional 7 jobs? A. That's correct.

Q. And that makes a total of 18 in the last column? A. That's correct.

122 Q. Now, you have indicated that you have had a reduction of requirements of 35? A. Yes, sir.

Q. Now, could you tell us some of the reasons for the reduction in the requirements of the people in the Communications and Signals Department? A. The efficient use of new machinery, new equipment, such as "hi-rail" cars, new circuit design and electronic equipment, the change-over of a 4400 volt line to 220 volts.

Q. Now, Mr. Webb, for my edification, what relationship does the 4400 volt line have to do with how many people you have to have in your department? A. The equipment associated with it requires considerable personnel to maintain.

Q. What— A. It's subject to lightning and there's old substation equipment that was antiquated that required considerable looking after.

Q. What sort of equipment was this primarily? A. This was all electrical equipment.

Q. I mean, what sort of equipment? A. Relays, transformers, fuses, circuit breakers.

Q. And before with the 4400 volts, you had to have such things as transformers and circuit breakers and

123 relays? A. Yes, sir.

Q. You don't need those anymore; is that correct? A. That is correct. We stepped the 4400 down to a lower voltage and they are not required.

Q. Now, does this reduce the volume of maintenance that you previously had? A. Yes, sir.

Q. Now, in addition, you mentioned the "hi-rail" car. How does this affect the number of people in the department, Mr. Webb? A. Well, this lets us have a more mobile way of moving about over a territory. We are not interfered with trains, or if a train is in the way, we can take to the highway. It lets us practically carry the tool-house on our truck. In other words, we have everything with us.

There's radio equipment to permit the contact with the dispatcher, to be notified as to when there is trouble and where the trouble is at, and to obtain information on the trains.

Q. Now, prior to the utilization of these "hi-rail", this "hi-rail" equipment, did you have any way of directing the maintainers by radio? A. Not necessarily.

124 Q. How were they contacted? A. Usually by 'phone to the dispatcher. They would contact the dispatcher or the dispatcher would contact them through an operator at home.

Q. But during the course of the day when they were working, there was no direct communication with them; is that correct? A. That's correct.

Q. Now, you joined the Florida East Coast—what was the date again? September of '63? A. September 16, 1963.

Q. Now, what steps have been taken since you joined the Florida East Coast with regard to obtaining employees in the Communications and Signals Department? A. Well, we have accepted applications and interviewed people and have selected those that we considered best qualified to become signal employees.

Q. Have these people, Mr. Webb, been fully qualified to perform the work in this department? A. Not entirely.

Q. Have they had to undergo training of some sort? A. Yes, sir.

Q. How long a period of training has been required before these people were qualified? A. Well it would

125 take at least four years to make them completely qualified.

Q. Now, how many supervisors are available in your department that can perform and/or train these new employees? A. Four.

Q. And you have at the present time 11 people who are in the process, some stage of training? A. Yes, sir.

Q. How many additional people can you accommodate in this training program with the number of supervisors you currently have? A. Well, we could add seven.

Q. And these were the jobs that you bulletined? A. Yes, sir.

Q. And how many responses did you receive to those bulletined positions? A. None.

Q. Now, prior, even prior to the bulletining, did you have vacancies, or were you attempting to fill vacancies that you had in your department? A. Yes, sir.

Q. Were you successful? A. No, sir.

Q. Now, with the 11 that you have and the 7 positions that you bulletined, Mr. Webb, would this have per-
126 mitted you to comply fully with the agreement that existed before the strike? A. No, sir.

Q. In what way would you not have been able to, with the total of 18 now, if you had got all 18—the 7 you bulletined and the 11 you already had? A. We would still have to have our supervisory personnel assist these men with the work that they would be performing in order to train them.

Q. And what is the reason for this, Mr. Webb? A. Well, it's the lack of qualified employees and the number of—limited number of supervisory personnel to instruct and train these men.

Q. Now, except for their limitation and knowledge or qualifications, would the 18 people have given you enough scope people to perform the work once they were fully qualified? A. Yes, sir.

Q. Now, at the present time, are you continuing to use your supervisors to perform part of this work? A. Yes, sir, we are.

Q. Now, if you were not able to continue to use the supervisors in this manner, would this have any
127 effect on the operation of your department? A. I'm afraid this would permit the signal system to run

down considerably and not meet the Interstate Commerce Commission's requirements.

Q. Would this have any effect on the operation of the Florida East Coast? A. It would certainly hinder operations to a great extent, probably cease.

Q. Now, before the strike, Mr. Webb, was some of the CTC equipment; that is in your department, is it not? A. Yes, sir, it is.

Q. Prior to the strike, was some of the installation being done by Florida East Coast employees? A. Yes, sir, it was.

Q. What was the situation when you joined Florida East Coast on September 16, 1963? A. The installation of CTC was being performed by contractors.

Q. Why was it being performed by contractors? A. The lack of qualified FEC employees to perform the work.

Q. Now, is the contracting out of this installation of CTC continuing at the present time? A. Yes, sir, it is.

Q. And why are you continuing to contract out
128 that work? A. The lack of qualified employees of our own to perform the work.

Q. Has the installation of CTC itself had any impact on the number of people you will require in the future? A. Yes, sir, I believe it has.

Q. In what way? A. Well, we have reduced the amount of equipment to be maintained by a reduction of signals and the type of equipment being installed, elimination of insulated joints and similar materials.

Q. What do you mean by an insulated joint, Mr. Webb? A. It is an insulation between two rails to separate circuits, electrical circuits.

Q. And do these joints require a particularly high degree of maintenance? A. In order to keep a signal system functioning properly, they require considerable maintenance.

Q. Now, how are you, by installing CTC, reducing the amount of maintenance that's attributable to these insulated joints? A. By extending the—by the newer type

track circuits, we are able to extend their length to a greater degree than you can with conventional cir-
129 cuits, which eliminates the number of joints installed; also the use of electronic track circuits for our operation at crossing protection reduces the number of insulated joints.

Q. What do you mean by electronic track circuits? I don't quite follow you on that. A. This is a circuit that you might say of a radio frequency or in the range of 1000 or 1.0 kilocycles to 8.0 kilocycles.

Q. And you are transmitting that by radio? A. Through the rails.

Q. Oh, through the rails? A. Through the rails.

Q. How were the signals previously activated? By having a line? A. No, through a combination of line wire and DC or direct current operated track circuits.

Q. Could you give us some idea of what sort of jobs these seven were that you bulletined, Mr. Webb? A. Well, one was a maintainer, a foreman, and three signal men and a couple of helpers, I believe it was.

Mr. Devaney: I have no further questions, Your Honor.

Cross Examination

By Mr. Shapiro:

130 Q. Mr. Webb, where did the four supervisors in your department come from? A. I assume, once upon a time, they may have been signal helpers, assistant maintainers, foremen.

Q. Were they employees of Florida East Coast? A. They were employees, former employees—or they are still employees of the Florida East Coast but probably under the scope.

Q. Were they there when you came? A. Yes, sir.

Q. How were you recruited? A. I was approached. They called me on the telephone and talked to me.

Q. Who did that? A. The Assistant Chief Engineer.

Q. Have you ever called anyone on the 'phone to invite them to work for the Carrier? A. I think I have, either once or twice.

Q. Do you know whether the Assistant Chief Engineer has attempted—do you know whether the Assistant Chief Engineer or any other officer of the Railroad has done this on behalf of your department? A. No, I'm not familiar if they have.

131 Q. What has the average size of the staff in your department been in the last year? A. Well, it has varied. You mean, within, including the scope people?

Q. Yes, sir, the over-all staff of your department? A. Well, it has—when I first came there, it was possibly three or four; I can't state specifically. It has varied from that point up to our present status, as shown on the exhibit, eleven.

Q. So there have been no reductions in your department? A. No, sir.

Q. Can your new equipment be operated by the present staff? A. Not entirely.

Q. How do you propose to operate it? A. The use of supervisory personnel.

Q. If the strike were to end and the former—I shouldn't say "former" but the striking employees were to return to work, would they be able to operate the new equipment? A. I think they also would need training.

Q. So that the problem in the use of supervisory personnel is in large part attributable to new equipment? A. Partially, yes, sir.

132 Q. Have you interviewed applicants for your department? A. Yes, sir.

Q. How many have you interviewed in the last year? A. Oh, maybe—I couldn't state specifically. If I may guess, I would say maybe up to fifteen.

Q. Up to fifteen? A. Yes.

Q. Has there been any difficulty in getting applicants to come to apply to your department? A. Well, there was —we had applications but the qualifications were the main problem.

Q. What does a Communications and Signals supervisor do? A. He supervises the maintenance, installation and inspection of signals and communications installation.

Q. What is his specialty? Electrician? Is he a radio man, telephone man, or can you describe him in some detail? A. He is a composite mechanic.

Q. A composite mechanic? What kind of background does a man have to have to qualify as a helper in the Communications and Signals Department? A. In my opinion,
he should have an electrical knowledge, mechanical
133 ability, and the readiness and the ability to learn.

Q. Now, what about the signal man? A. Well, the signal man is normally promoted from your lower classes after a training period.

There's one other qualification that anyone needs to learn with the Railroad and that's train operations, particularly in the Signals Department.

Q. Now, with the seven additional employees, you would be fully able to comply with the collective bargaining agreements in the light of your present operation? A. If they are qualified employees, qualified in or able to maintain our equipment.

Q. For the moment, putting aside any technical definition in the collective bargaining agreement of journeymen, how long does it take to train a man to perform the technological duties of a helper, assuming that he has the background of electrical knowledge, mechanical ability and the ability to learn? A. In accordance with the agreement, it takes four years.

Q. Yes, sir. Putting the agreements aside now? A. That would depend upon the ability of the man, for one thing, and what his past experience was.

134 Q. Have there been any new employees hired in your department since you came? A. New employees? Yes, sir.

Now, what do you mean by "new employees"?

Q. Employees who were— A. That have never worked for the Railroad previously?

Q. Well, yes. A. Yes, sir, there have been.

Q. And have you been able to train them to perform adequately the duties in your department? A. We are in the process of training them. I wouldn't say they were fully qualified as of this date.

Q. Are they getting on-the-job training? A. Well, that's practically the only training we can give them is on-the-job with the actual work that has to be performed.

Mr. Shapiro: I think that's all I have, Your Honor.

Further Cross Examination

By Mr. Milledge:

Q. When was the last time, Mr. Webb, you added a man to your department? A. I believe it was in the Spring. I couldn't say what date exactly.

135 Q. Spring of this year? A. Spring of this year.

Q. And you say you need seven more men to operate under the contract? A. Yes, sir.

Q. But you have been operating since the spring with, what is it, eleven scope employees? A. Eleven scope employees.

Q. And you haven't added anybody since then? A. No, sir.

Q. And I take it you've got more work than your men can handle? A. Let's say there's some work that they can't handle because they're not qualified.

Q. Are you getting the work done or aren't you ? A. We're getting the work done, partially with supervisory personnel.

Q. When you say "supervisory personnel", are you talking about these four supervisors? A. Yes, sir.

Q. You're not talking about supervisors from some other department, are you? A. No, sir, no other department.

Q. Are you letting your eleven men work in other
136 departments? A. I can't say that I am.

Q. And you haven't had any men from other departments come to assist your eleven, have you? A. Not specifically.

Q. So you don't have any problem in your department about crossing craft lines at the moment? A. I haven't.

Q. What you say is, then, that you would like for the moment to be able to continue to use—are you a supervisor? I mean, are you one of the four? A. No, sir.

Q. All right. But you say for the moment you would like to be able to use those four supervisors to do actually work in addition to just supervise? A. That's correct, in order to assist with these men's training.

Q. And is the recruitment on the FEC of new employees, is that a centralized recruitment? A. I wouldn't say essentially that it was.

Q. I mean, do you—you told us that there were three or four; is this correct, when you came to work in September of '63, there were three or four scope people? A. Yes, sir.

137 Q. All right. So you have added seven or so, seven or eight, since then? A. Yes, sir, I may be—

Q. Since September? A. I may be wrong one or two but close enough.

Q. All right. Now, did you yourself go out and get these men or did Mr. Wyckoff's office get them? A. I would say I was approached by men wanting employment, and some had been sent me by Mr. Wyckoff's office.

Q. All right. So you did get some of them from centralized personnel recruitment? A. Yes, sir.

Q. Now, have you, since last April, have you had a requisition in to Mr. Wyckoff for seven more men? A. I wouldn't say necessarily seven; I've had a requisition in for men.

Q. Continuously? A. Yes, sir.

Q. And he hasn't supplied you a man since last April? A. Let's say he hasn't sent me an applicant that I would accept.

Q. What will you accept? A. A man with the qualifications that I've set forth here previously.

138 Q. Well, I didn't—you tell us again what qualifications, what educational qualifications? A. I would like a man to have a high school education or the equivalent; electrical experience or knowledge; mechanical ability; ability to learn.

Q. So I take it you have turned down—have you turned down applicants since April? A. Yes, sir.

Q. How many have you turned down? A. I would say possibly three.

Q. Were those men sent to you by Mr. Wyckoff? A. Well, I would say two of them were.

Q. So he has only sent you two men since April? A. I would say yes.

Q. And you've turned them both down? A. Yes, sir.

Mr. Milledge: That's all I have, Judge.

The Court: Anything further, Mr. Devaney?

Mr. Devaney: Nothing further, Your Honor.

The Court: Anything further?

139 Mr. Shapiro: No, sir.

The Court: Come away, Mr. Webb.

(Witness excused)

H. E. Hales,

having been produced and first duly sworn as a witness on behalf of the Defendant, testified as follows:

Direct Examination

By Mr. Devaney:

Q. For the record, would you state your name, please. A. H. E. Hales.

Q. Are you employed by the Florida East Coast Railway Company? A. I am.

Q. What is your position? A. General Superintendent, Motive Power. I'm also in responsible charge of the Stores Department.

Q. Mr. Hales, I hand you Defendant's Exhibit BB.

Now, I notice in your Department, Mr. Hales—and your department is the Mechanical Department; is it not? A. Mechanical and Stores.

Q. And Stores. Now, in the column here indicating the reduction of requirements, this indicates that in the
140 Mechanical Department that you have present requirements for 82 fewer people than were required before the strike.

Could you tell us some of the reasons for the reduction in present requirements in your department? A. Yes, there are a number of reasons.

Prior to the strike, the Florida East Coast manufactured its own bearings for freight equipment. We have placed all work in the Car Department on a compulsion basis.

Prior to the strike, we performed AER repairs to foreign equipment, primarily equipment of Fruit Growers Express. We have discontinued the performance of work for all outside parties, unless it's essential to our operation.

Q. Now, the manufacture of bearings, that is the 6 that appears in Column No. 4; is that correct? A. That's correct.

Q. So does that also appear in the column headed "Reduction of Requirements"? A. You mean about whether it's in there or not?

Q. Right. A. I presume it is.

Q. Now, when was the manufacture of bearings discontinued, Mr. Hales? A. Shortly before the strike.

Q. Can you tell us very briefly, Mr. Hales, how
141 you arrived at the allocation between the people required in the passenger portion of the operation and

those required in the freight only operation? A. Yes. In many localities, the force assigned to the passenger work was completely separate and independent and it was only necessary to make an analysis of the force reports and payroll reports of the period immediately prior to the strike, those that were not used exclusively to passenger car work could be reasonably allocated thereto on the basis of hours.

Q. Do you go through these records to make this allocation? A. I did.

Q. Now, with the additional positions that were bulletined, Mr. Hales, would you have had sufficient personnel—and you did bulletin 52 jobs; isn't that correct? A. That's correct.

Q. With these 52 jobs, would you have had enough people to have operated in compliance with the agreement? A. No; no, I would have been short. Had they been filled, I would have been short about 17 or 18 jobs. The number of people required in the Mechanical Department fluctuates with the amount of business we are doing, too, so
142 the seasonal requirements would have had to be taken into consideration.

Q. Now, this indicates that you had indicated on this breakdown that an additional 11 positions would have been required if the first bulletin had been filled; is that correct? A. That's correct.

The Court: Would have been required, what?

Mr. Devaney: If the first, if the 52 jobs covered by the first series of bulletins had been filled, 11 more would have been required—

The Court: Oh, I see.

Mr. Devaney: —to permit operations in conformance with the agreement.

By Mr. Devaney:

Q. Now, I note that the footnote indicates, Mr. Hales, that you did in fact bulletin additional jobs; is that correct? A. That's correct.

Q. Now, since November the 2nd, have you bul-
143 letined any further jobs than the six indicated in Footnote No. 2? A. Yes.

Q. In other words, you have bulletined six on November 7th through the 17th. What about between the 17th and the present time? Were there any more after that? A. Well, we have filled some jobs that we didn't have to post bulletins for.

Q. How many jobs have you filled, Mr. Hales? A. Other than this, I would say about five.

Q. Now, in response to the bulletins, did you receive any bids from any of the employees who were on strike? A. Would you repeat that?

Q. Did you receive bids from any of the employees who were on strike? A. I received one bid from an employee on strike.

Q. And did this one employee return to work? A. Yes, he did.

Q. Now, did you take any further action in the Mechanical Department to assign senior persons to jobs, even though they had not submitted a bid? A. Yes, we—all qualified trainees were qualified as journeymen on the basis of skill, not on the basis of the four-year rule but on the basis of competence were allowed to bid on these
144 vacancies and they were awarded such positions if they were competent.

Q. Now, Mr. Hales, when did you join the Florida East Coast? A. March 1st, 1963.

Q. Now, what steps have you taken since March 1st, 1963 to secure new employees? A. Well, when I came to the Florida East Coast, we had about 35 people employed in the Mechanical Department, and of the additional 100 approximately shown there in Column 5, I suppose I've recruited 75 of them.

Q. In what way have you been able to recruit these people? A. Well, I've gone to see personnel people in other industries and plants in Jacksonville and Miami area.

I've gone out on recruiting trips over in Deland. 50% of our employees in the New Smyrna Beach shop live in Deland. They live in Daytona Beach. I have personally devoted a good bit of time to this.

Q. Now, have the employees that you now have, the 136, are all of those people fully qualified, Mr. Hales? A. No, they aren't.

Q. Have you been able to obtain people who were fully qualified? A. Very few. We have obtained some
145 people, like retired chief petty officers from the Navy who have had engine experience and basic electric experience; that served to reduce their training time and indoctrination into the railway equipment work. The amount of vocational training and experience a man had in similar work has been the determining factor of the length of time that was required to qualify him as a journeyman.

Q. Now, is it still necessary, Mr. Hales, in your department to utilize employees across craft lines? A. Yes, it is.

Q. And what is the reason for this? A. The principal reason for it is because we do not have available the skills we need to perform the work to comply with all the various standards of the Federal laws that govern the condition of motive power and rolling stock, the interchange rules. We just don't have enough skilled people.

Q. Could you give me a specific example or two of what you mean, Mr. Hales, and how people are used in one job and then cross a craft line to do something else? A. Well, yes, I can.

Most sheet metal workers are qualified pipe fitters and, since they are accustomed to doing metal work, they can do work of the boiler maker craft or the blacksmith
146 craft. That's an example.

An automotive mechanic, as one who has a high degree of skill, usually has some basic electrical knowledge. He's accustomed to replacing brushes in generators and motors and things of this nature. In a short period of

time, he's competent to do similar work on traction motors and generators.

There are numerous examples. Those are only two.

Q. Now, are you still having to do this in order to perform the work in your department? A. Yes, I am.

Q. Are you presently utilizing the exempt and non-exempt supervisors in your department to perform what would otherwise be scope work? A. Only to the extent that it's necessary to operate. Where we do have people in a group that are qualified to do it, that is, work, they do this work under the direction of the exempt supervisor or either the non-exempt supervisor. There are some jobs that both groups work in the craft on. They are primarily jobs that require a very high degree of skill and sometimes even special and unusual qualifications.

Q. Well, why do you not use the people who are
147 employed as scope people to do the work, rather than the supervisors? A. They don't have the skill to do it. It's a matter of available skill.

Q. Now, what effect would it have on the operation of your department, Mr. Hales, if you could not continue to use the supervisors to perform this scope work and to use the scope employees to cross the craft lines in the manner that you have explained? A. Well, we would have a very rapid and general deterioration of the condition of the equipment and we would fail to meet the requirements of the various Federal statutes that govern the condition of equipment.

Q. Would this have any impact on the operation of the Florida East Coast? A. Yes, it would. In time, we would have to shut down.

Q. Have your efforts to recruit diminished at any time, Mr. Hales? A. No, they haven't.

Q. Is your program of trying to secure employees continuing to the present time? A. Yes, it is continuing.

148 Mr. Devaney: No further questions, Your Honor.

Cross Examination

By Mr. Shapiro:

Q. How many supervisors are there in your department, sir? A. You mean general foremen as well as foremen?

Q. How do you define supervisors in your department? A. Well, we have the total of 23 exempt and non-exempt supervisors.

Q. What is the difference between an exempt and non-exempt supervisor? A. An exempt supervisor is a general foreman.

A non-exempt supervisor is a scope foreman.

Q. How many general foremen do you have? A. I'd be glad to count them up. Let's see, we have two in the Locomotive Department at Bowden—about 14.

Q. About 14? A. About 14.

Q. You have 14 general foremen and 23 scope foremen? A. No.

Q. I'm sorry. A. That figure I gave you was total.

149 Q. Total? A. Yes.

Q. 14 general foreman. And how many scope foremen then? A. The difference.

Q. The difference.

The Court: It would be 9?

The Witness: Just about.

The Court: 9.

The Witness: I can count them up.

The Court: Well—

The Witness: And name them, if you would like.

By Mr. Shapiro:

Q. How many scope employees have been in your department, or how many scope employees were in your department at the beginning of the year, say, 12 months ago? Do you recall? A. I can tell you, if you will permit me to look it up.

150 I have a count on January 18, 1964, along with a summary, which I can take out the exempt personnel and give you an approximate figure.

Q. Would you do that, please? A. I have a summary here as of September 30th, '63, about 109.

Q. 109? A. Yes.

Q. Now, you have increased you scope personnel by about 24 employees since September 30, 1963? A. Even more.

Q. Even more. Has there been any reduction at any time since you have come to the Carrier in the size? A. No. There has been an increase. In fact, we actually are employing more than is shown on this report right now. It has been an increase of about five people over this 136.

Q. So it is now actually at— A. About 141.

Q. —141. Where do your people come from when you recruit them? A. Various places. We have some that are former metal workers; some that are former automotive and diesel mechanics; some that have worked in
151 machine shops elsewhere; some that were former shipyard workers here in Jacksonville, welders and most any of the metal crafts.

Q. What qualifications do you require before you accept a man in your department? I'm speaking of technological, technical qualifications. A. Well, my requirements have been so vast. If an employee could make and meet our basic fundamental requirements and was willing to locate where I had the work available, I have been able to work out something for most of the applicants if they had some form of prior experience.

Q. So your chief, your requirement was prior experience; is that it? In one of the crafts and classes, or one of the lines of work that your department includes? A. In placing a man in an apprentice classification, certainly importance was given to his ability to learn, whether he had any training in technical schools or welding schools or heavy equipment schools, the length of his experience in

allied work, such as automotive work or engine work or electrical contracting, things of this nature.

Q. How did you determine his experience? I'm sorry. How did you determine his qualifications? A. Well, in many cases, we hired a man at the lowest apprentice rating and, within a probationary period, left it entirely up to the supervisor who was assigned the responsibility for
152 training the man to determine his level, and within that 45-day period he was reclassified on the basis of his skill and experience to his proper level in the training program.

Q. How did you select him for a probationary period? A. How did I select him?

Q. Yes. A. This is when we were working under the "Conditions of Employment".

Q. And how did you select the men at that time? What procedures did you use? A. Oh, I used personal interview. We actually gave him certain tests in welding and general mechanical experience, all kind of vocational testing.

Q. And any educational requirements? A. Yes, but we didn't always—that wasn't the criteria, whether a man worked or not. We were seeking primarily skilled people, trades, metal trades, electrical trades, journeymen workers.

Q. Any physical requirements? A. Well, I don't determine the physical standards. The Chief Surgeon does that. I've had many qualified applicants on the basis of skill that did not meet our physical standards.

153 Q. Were they physical standards in effect prior to the strike? A. I don't know. I was not here prior to the strike.

Q. When did you make a determination that you would not require the hundred—I'm sorry, the 82 positions that are listed in Column 7 on Exhibit BB, which I think is before you; is it not? A. When did I make a determination of that?

Q. Yes; you will note— A. The strike itself made a determination of that. This was automatic. This is a consequence.

Q. So that the reduction in—your testimony is that the reduction of requirements for the basic operation of the Carrier, as listed in Column 7 of the exhibit which is before you, is not a result of changes in operating methods but simply a response to the strike? A. Not entirely. Some of these 82 is because operating conditions have changed; but quite a few has been the consequence of the strike. For instance, we were doing a lot of work for outside parties that we didn't actually have to do. In the Car Department alone, I estimate there was some, oh, 52, 53 people engaged in repairs to foreign equipment that we did not have to perform.

154 Q. Now, If you were required to operate without the 52 employees that are listed in Column 6 of Exhibit BB, which is before you, what effect would that have on your operation? A. Well, it would, in a short time, either we would have to curtail some of the operation or it would be impossible to operate.

Q. Now, if you did curtail, would you still be able to continue to operate? A. Certainly we could operate a portion of the service.

Q. What portion? A. 70%

Q. Beg pardon? A. 70%.

Q. 70%? A. That's my estimate.

Q. How do you reach that figure, sir? A. 25 years of experience in this field.

Q. And this is just your feel for the area as a professional? A. Beg pardon?

Q. This is the way, you have a feel for the area; is that what you are basing it on? A. No. I've made

155 an appraisal of what every man in this department does and what is required to be done, and made a comparison.

We need about, roughly, a third more people.

Q. Have you had any difficulty obtaining employees? A. Oh, I could fill the shop full of unskilled people but I haven't been able to locate all the skills I need; but each day I improve it some.

Q. And the outlook on the whole is cheery; is that what you are telling us? A. Certainly, as we intensify our efforts to train the trainees that we have and qualify more people, our personnel problem becames less acute.

Q. How long would it take you to recruit 52 additional people, if you undertook an intensive recruiting program? A. Seven or eight months.

Q. Seven or eight months? A. Yes.

Q. How long would it take you to get 25? A. Half that time.

Q. 120 days? A. Right.

156 Q. What are the principal crafts and classes that are in your department? A. Machinists, electricians, sheet metal workers, car men, boiler makers, all the shop crafts.

Q. Is there any— A. And firemen and oilers.

Q. This is stationary firemen? A. Yes.

Q. Is there any of those which require special railroad experience or knowledge? A. Yes.

Q. Which ones? A. Machinists, electricians, pipefitters —practically all of them.

Q. But you have been able to recruit from industrial sources a satisfactory work force? A. Very satisfactory.

Q. Do you think your work force is superior to what it was before the strike? A. Well, I don't know what it was prior to the strike. I was not here.

Q. Were you then working for a railroad? A. No. I was Equipment Specialist with the Interstate Commerce Commission.

157 Q. Had you been engaged in railroad supervisory work? A. I'm a former Chief Mechanical Officer, Central of Georgia Railway Company, and also the New Haven Railroad.

The Court: What was the last one?

The Witness: Central of Georgia and New Haven Railroad.

The Court: New Haven? All right.

Mr. Shapiro: I think that's all I have.

Further Cross Examination

By Mr. Milledge:

Q. Mr. Hales, you are also up here to testify about this Stores Department, I take it? A. Yes, sir.

Q. What is that? A. That's just exactly what it says. It's the Stores Department. It handles the storing and dispersal of materials for our usage, and purchasing of materials for our usage.

Q. What scope of personnel, what organization? A. Primarily the clerks.

Q. So these—what do these people do? A. They handle the clerical work in the requisitioning and pro-
158 curement of materials, dispersal of those materials.

Q. That's in connection with your shops? Is that what it is? A. The shop, the Mechanical Department, is the greatest user of the stores dispersals, yes.

Q. And you've got—so you don't have any personnel problem, I take it, in the Stores Department? A. None at the moment.

Q. So I take it you are not asking His Honor for any special variances pertaining to that department?

In other words, you are operating, you are just using clerks and clerks are doing clerk's work; right? A. That's correct.

Q. And you are not putting anybody from outside in to help them, are you? I mean, are these 19 people getting the job done? A. Yes.

Q. And do they go out on the road or do they go into the shops? A. Well, we have two separate—we have a line of road classification as well as a localized classification,

so we are attempting to keep these two categories separate.

Q. Well, anyway, you show here that you've got 19 and you really only feel that you need 20? A. That's
159 correct.

Q. Isn't that what this shows? A. That's correct.

Q. So essentially, you don't have a personnel problem here? A. That's correct.

Q. All right.

Now, you were about to tell us awhile back the number of men in the shop craft, that is, your Motive Power Department, on January 14, 1964, but I don't believe you ever got to that. A. I have the compilation but it also includes my office staff and all the exempt people.

Q. What it essentially shows is that the number of people in January is essentially the same as you show today; is it not? In other words, it shows essentially 130—135 people back in January, just like it does today? A. January 18th?

Q. Approximately. A. No, there is some difference. I can determine the difference by location.

In the two shops, we have an increase or 8 men at New Smyrna Beach.

160 The Court: I'm not sure just what this answer means.

By Mr. Milledge:

Q. Do you mean that the New Smyrna shop increased eight men from January to November; is that what you mean? A. That's correct. We've had some force turnover. I mean, scarcely a week passes that you don't have some of the older ones dropping out and some new ones coming in, some promotions.

Q. All right. Well, in any event, I gather your figures indicate somewhere around 120 or so in January, 120-130 in January? A. I would have to go through and pull out—

The Court: He says 136 now and 8 less in January.

Mr. Milledge: All right.

The Court: That would be 128; isn't that right?

Mr. Milledge: All right.

By Mr. Milledge:

Q. There is no question, Mr. Hales, that there is great savings in money, an enormous saving to the Railroad, to be able to operate men in more than one craft; is
161 that not true? A. Yes, this is true.

Q. And that's what you have been doing up until the present time; is it not? A. Now, let's don't put words in my mouth.

I don t assign an electrician to do a laborer's work if I have electrician's work for him. And conversely, I don't assign a machinist to do electrical work. I try to utilize the skill of the people that we have to get the work done. We have a static work load that has to be done to comply with Federal law, insofar as locomotives are concerned, and certain things with respect to rolling stock.

Q. Well, do you work them across craft lines or don't you? A. Yes, we do.

Q. All right, that was my question.

Now, how many electricians do you need? A. Oh—

Q. Or how many do you have right now? A. I need 9. I'll take 9 in the morning.

Q. How many do you have right now? A. I can add them up.

Q. You didn't bring those figures? A. Yes, I can figure them up.

162 Q. Let me ask you this, just a general question: Have you got a surplus in one mechanical division? A. I don't know what it is.

The Court: Is the answer no?

The Witness: No.

By Mr. Milledge:

Q. The answer is no?

Now, when was the last time you took one of these recruiting trips? A. About two weeks ago.

Q. Where did you go? A. I went to Deland.

Q. Who did you see? A. The operator of a machine shop.

Q. For whom? A. For himself.

Q. Your own machine shop? A. No.

Q. Who did you go see? A. The man's own machine shop, his machine shop, yes.

Q. What man?

163 Mr. Devaney: Your Honor, I object to this. I don't see that this has any relevance to what we are inquiring into, as to certainly Mr. Hales—what persons Mr. Hales may see, it would seem to me that he has testified that he has made recruiting efforts.

The Court: Objection overruled.

Mr. Milledge: What man?

The Court: He's on cross-examination.

The Witness: I think his name is Adams.

I also called on a—

By Mr. Milledge:

Q. Well, let's hold on: Mr. Adams; and where does he live or where is his place of business? A. In Deland.

Q. What type of business? A. Machine shop.

Q. What type of machine shop? What does he do? A. He operates a machine shop, a general repair machine shop.

Q. All right. And what was the nature of your
164 conversation with him? A. I told him that I needed some qualified machinists and asked him if he knew of any that I could contact.

Q. And what did he—and did he give you any leads? A. Yes.

Q. All right, did you see somebody else? A. Yes.

Q. Who was that? A. A man that operates the Deland Armature Works.

Q. What is his name? A. I'm sorry, I can't call his name.

Q. All right.

Now, as a result of this trip, I think you have already told us you got five new men in this past month, and that is a result of this recruiting? A. No. I don't say that all five men are a result of recruiting.

Q. Where did they come from? A. Some of them were referred to me by the Personnel Department.

Q. How many? A. I would say probably three of them.

Q. How many did you get from your recruiting
165 drive? A. Well, I got two.

Q. All right.

You started, I think you have told us you started, back on March 1, 1963, with 35 people? A. That's about right.

Q. And on September 30th, you had 109? A. That's about right.

Q. So that's 75 more people. And then you figured out what it was about January 18, I believe you gave us the date; and you are presently lacking about 45 men, you say, of being able to comply with the contract? A. No. We bulletined 52 vacancies.

Q. Yes. A. We needed all 52 people. They had the skills that we need.

In addition to that, we have bulletined 6 additional jobs.

In the meanwhile, we have promoted some trainees from apprentice to journeymen. So I wouldn't say—

Q. These figures don't include apprentices? A. Yes, they include trainees, apprentices.

Q. Well, when you promote somebody, does that change these figures? A. No, but if we promoted a man
166 from an apprentice classification, there's no requirement on us to bulletin a job for an apprentice, but once he becomes qualified for a journeyman's job and we

expect to use him as a journeyman, we have to bulletin a vacancy.

Q. What does that have—what does that mean about your total man-power requirements? It reduces your total man-power requirements; is that it? A. No, we haven't actually reduced the man power. We have actually increased it from the number we have shown here.

Q. So that your requirements are less than they show on here; is that it? A. In other words, if we promoted an apprentice to a journeyman, we would probably bring in another trainee to fill his vacancy.

Q. Well, have you got plenty of people eligible to be trainees? A. We have quite a few apprentices.

Q. Have you got enough to fill the 52 vacancies? A. Just by coincidence, we have 52 apprentices.

Q. Just by coincidence.

Mr. Milledge: That's all I have.

167 Redirect Examination

By Mr. Devaney:

Q. Mr. Hales, did I understand you to say that in January of 1964 you had eight less people over-all than you have at the present time, or did— A. That's about right, in two shops.

Q. Only in two shops? A. Those are the only two shops. The total figure in the other shops is comparable, but they were different people.

Q. And because the other people that you had to bring in represented the turn-over in your department in the other shops; is that correct? A. Yes, we've had a good bit of turn-over.

Q. Now, when you testified you had obtained satisfactory employees from another industry, Mr. Hales, are these people fully qualified journeymen? A. No, they aren't; but where a man has worked in a similar journeyman's classification and is trainable, he can become a very

satisfactory employee. The amount of his experience and training prior to employment usually determines the length of time it takes to qualify him in the railroad field.

Q. Have these people still had to undergo con-
168 siderable training before they would reach the journeyman classification? A. Yes.

Q. Could you tell us, Mr. Hales, what sort of jobs were involved in the 52 that you bulletined? A. If you will bear with me until I can find it.

Well, there were, from memory, there were 13 machinists; 9 electricians; 4 engine house foremen; a car foreman, or 2 car foremen. I have it in detail, if I can find it. Here it is:

4 engine house foremen; 1 wheel shop foreman; 3 car foremen; 13 machinists; a boiler maker; 9 electricians; 2 sheet metal workers; 2 carmen air brake repairers; 2 carmen engine carpenters; 14 freight car repairers and car inspectors.

Q. Just out of curiosity, what kind of carpenter was that? A. Engine carpenter.

Q. Just out of curiosity for me, what does an engine carpenter do? A. An engine carpenter is a carman who does work with his qualification on locomotives, such as replacing glass in the cab or certain work that, due to past practice, was transferred from the old wooden cab
169 on a steam locomotive into the modern cab or steel cab of a diesel.

Q. Now, in the main, Mr.— A. Painting is carmen's work, too, on locomotives.

Q. In the main, Mr. Hales, who is now performing the work of the 52 additional jobs that you bulletined? A. Well, some of it is being performed by exempt and non-exempt supervisory people, general foremen. Some of it is being performed by trainees, and some of it just isn't being performed.

Q. Now, what sort of work would fall in the last category or just not being performed? A. Anything that

could be deferred without detriment, immediate detriment to our ability to stabilize our operation, like painting of our passenger units that are sitting out in the yards. They are deteriorating but we are not using them. That's a good example.

Q. Now, what sort of skills, Mr. Hales, of an essential nature are now being performed by your exempt and non-exempt supervisory employees? A. Well, it's primarily work that we don't have anybody else qualified to assign to. It's almost limited to that requiring a particular type of skill or vocational training.

Q. Could you give us some examples, specifically,
170 of what you are referring to? A. Yes. Car inspection in our train yards here in Jacksonville is a good example, where we don't have enough qualified car inspectors to make interchange inspection. This inspection is made under close scrutiny of our general foremen.

Another example is in the maintenance of our radio equipment on locomotives; a prerequisite requirement for adjusting the transmitter is to have a license granted by the Federal Communications Commission and we need three radio electricians. We only have two employed so, when it's necessary to do certain transmitter work, we have to use our supervisory people to do this, depending on the volume of the work that is necessary at the time.

Q. What sort of work does a car man do, Mr. Hales? A. A car man?

Q. Yes, sir. A. He inspects and repairs freight cars and brake equipment on freight cars, all associated work of this nature.

Q. Now, are some of your people in the car shop doing this kind of scope work? A. No, it's not just—it's something that requires an unusual skill or experience,
171 where they are actually working in the craft.

Mr. Devaney: No further questions.

The Court: You may come down, Mr. Hales.

(Witness excused)

The Court: I'm just wondering. I told you that I would hear some additional matter in the Engineers' case during the day. I just wonder if we hadn't better break off and go into it.

Mr. Devaney: Well, that is agreeable with us, Your Honor.

The Court: Sir?

Mr. Milledge: That would be entirely—

The Court: I don't know how long it will take. I don't know what you have in mind. But the Stay I entered was set to be to and including November 30, I think is what I said. And Judge Tuttle's Order was specific that it ended at, I thought it was 12:01 in the morning but it's 00:01 in the morning but I think that means a minute after
172 midnight anyhow.

Mr. Milledge: That's right.

The Court: And if you have something you want to take up about it, maybe we ought to go into it at an early enough hour to do some good.

Suppose we break off for about five minutes and then drop this and go into that case.

(The Court thereupon heard another matter unrelated to the subject proceeding, after which the following further proceedings were had:)

The Court: It's apparent we cannot finish the Government's case, the non-ops' case, this afternoon; that we are going to have to go over and take some more testimony in the morning on it. And if you want to stop now, it's 5:00 o'clock now. We can stop or we can go on for a few more minutes. I don't think we can finish it in either event.

Mr. Devaney: Either procedure is entirely agreeable with me, Your Honor. I'm willing to continue or willing to adjourn, whichever is the pleasure of the Court.

173 The Court: Well, I would just as soon go on and

get another start at 9:30 in the morning, if it is agreeable with you, Gentlemen.

Mr. Milledge: All right, sir.

The Court: Take an adjournment until 9:30.

(And thereupon, at 5:00 o'clock p.m., on Monday, November 30, 1964, the Court adjourned to be reconvened at 9:30 o'clock a.m., on Tuesday, December 1, 1964.)

174 (At 9:45 o'clock a.m., on Tuesday, December 1, 1964, pursuant to adjournment of the preceding session, the Court reconvened and the following further proceedings were had:)

The Court: Good morning, Gentlemen.

Counsel: Good morning, Judge.

The Court: All right. You may proceed, Mr. Devaney.

Mr. Devaney: Mr. Davidson.

A. A. Davidson, Jr.,

having been produced and first duly sworn as a witness on behalf of the Defendant, testified as follows:

Direct Examination

By Mr. Devaney:

Q. Would you state your name for the record, please. A. A. A. Davidson, Jr.

Q. And are you employed by the Florida East Coast? A. Yes, sir.

Q. What is your position? A. Assistant Chief Engineer.

Q. Now, as Assistant Chief Engineer, does the
175 Maintenance of Way work fall under your jurisdiction? A. Yes, sir, it does.

Q. Mr. Davidson, I hand you—

Mr. Milledge: Excuse me, I can't quite hear. You'll have to speak louder.

The Court: I would like the counsel and the witness to both speak louder, if you don't mind.

By Mr. Devaney:

Q. I hand you Defendant's Exhibit BB.

Now, in the Maintenance of Way Department, Mr. Davidson, I notice that you have shown a reduction of requirements of 112 people. Could you tell me the reasons for this reduction in requirements? A. Yes, sir, a combination of factors:

One, a change in our operations, that is, terminals that are not being maintained as terminals that were formerly maintained as terminals;

Better and improved work methods;

Addition of additional equipment that performs work cheaper and with fewer people.

Q. Could you give us some specific examples, Mr. Davidson, of new equipment that you refer to? A. Yes,
176 sir. Our maintenance is based primarily on a timbering and surfacing gang, now and before the strike. We've acquired new tamping machines that have a considerably increased capacity. These machines automatically or electronically raise the track to surface and tamp the track. Recently we have surfaced, with only two operators and no additional help, a mile and a half or mile and three-quarters of track in a day. This formerly required 18 to 20 men to perform this work. This new gang has a capacity of over 200 miles of track per year, which places our track on a good maintenance cycle.

We've acquired additional cars for handling ties.

The Court: Wait a minute, Mr. Davidson.

(Brief pause while sirenes passed)

The Court: Go back just a little bit.

The Witness: We have acquired six additional tie unloading cars. This work was performed—tie unloading in front of the T&S gang was performed by 8 or 10 men throwing the ties out of the car, and we now unload the ties with one operator.

And we have acquired a front end loader with a
177 winch. We are able to relocate turnouts as units, that is, without disassembling the pieces, and this can be done in three or four hours with a small, 4 or 6, man work force. It formerly required 8 to 12 men three days to relocate a turnout.

We've acquired or we have modified our tamping machines. They formerly did a very inadequate job of smoothing. We have added additional units to those machines and now get better work which lasts longer and requires less frequent smoothing.

We've acquired a new ballast regulator which does our dressing and reduces the number of laborers formerly required to do the dressing.

One of our new tampers now will surface a turnout. This has always required 12 men four or five hours to surface a turnout, and we can now do it with this new tamper with 2 or 3 men.

We have a unit now for aligning turnouts. This formerly required a large force and was a difficult job. We can do this with one operator, one laborer.

These are the things that added to the fewer men required.

By Mr. Devaney:

178 Q. Have you also acquired new inspection equipment? A. Yes, sir. I failed to mention our "hi-rail" equipment, which is probably—our basic inspection and repair system was formerly by motor cars, and now this work is performed by "hi-rail" trucks that can easily get on and off of the rail and are highly mobile. They are equipped with a lot of power tools that formerly required a number of men to handle, and these are stationary on the truck and can go by rail to a site and do the necessary smoothing or repairs with small forces; and because their mobility can be used over a much wider area than the motor car. They are equipped with radios, which

gives much more track time than we formerly had by constant contact with the dispatcher.

This has added to our—

Q. Has the installation of CTC had any effect on the number of people in your department, Mr. Davidson? A. Yes, sir, approximately one-fifth of the Railroad, the main line, has been CTC'd and this effectively reduces the number of miles that need to be maintained. It allows us to remove the number of crossovers which are always expensive to maintain and require a lot of maintenance. We have less track to maintain and, of course, this program, as it continues, will probably further reduce the
179 number of people required to maintain the Railroad.

Q. Now, I notice that in your department a total of only 6 jobs were bulletined on November 2nd and 3rd. What types of jobs were involved in those six which were bulletined, Mr. Davidson? A. We were seeking a bridge gang in these bulletined jobs. This is the area that we need people in the most. And one of the jobs is a section foreman job.

Q. Is the bridge work being performed by your own employees at the present time? A. Our bridge maintenance is being performed by our own employees and some construction. We do have a bridge contract force who are doing some rebuilding. If we were able to fill these bulletined jobs, we would be able to do this with our own forces.

Q. Now, except for this work which is contracted out, Mr. Davidson, are you able, with the number of people you now have, to comply fully with the agreement covering the employees in your department? A. Yes, sir.

Mr. Devaney: No further questions, Your Honor.

Cross Examination

By Mr. Shapiro:

180 Q. Mr. Davidson, when did you join the Florida East Coast Railway Company? A. April, 1964.

Q. And where did you come from, sir? A. Southern Railway System.

Q. You were Assistant Engineer on the Southern Railway? A. Assistant Division Engineer.

Q. Division Engineer? A. Yes, sir.

Q. Are you a railway engineer by training? A. Yes, sir. I'm a civil engineer by college training and railroad engineer by twelve years of experience.

Q. How did you familiarize yourself with your new job when you came to the Florida East Coast Railway Company? A. By covering the track, to begin with. The quickest way was by train and, the second day I was employed, I covered all the main line by riding an engine; and since that time have travelled extensively by train and "hi-rail" car. A big majority of my time is on the track by on-the-spot inspection.

Q. Have you examined the records of your department to get a picture of how the Railroad operated prior
181 to the time you came? A. Yes, sir.

Q. And you are familiar with the Railroad's requirements and operations prior to the time you came? A. Reasonably so, yes, sir.

Q. Do you know the size of the work force in the Maintenance of Way Department twelve months ago? A. Yes, sir. In October, 1963, we had 71 employees.

Q. So that you have increased your work force in the last year by what number? A. Well, the total today is 115, so we have increased it by 44.

Q. Have you had any difficulty in recruiting people? A. Yes, sir, we have had considerable difficulty.

Q. But you have been able to acquire 44 employees in the last year? A. Yes, sir.

Q. When did you determine that your requirements had been reduced to a point where you could eliminate 112 positions from the number of positions which had existed prior to the strike? A. I wasn't faced with eliminating anyone, so we tried to bring the state of maintenance up

to an acceptable one by adding forces as they were required and as we could acquire new men. And we have, we
182 think, reached that point now.

Q. The question was: When did you reach— A. Very recently; I don't think there is any specific time. We have up until, and still are, creating new gangs and we are doing this by surplus on larger gangs being eliminated by additions of mechanized modern equipment. And we think, in fact I think that probably in the last few months I have begun to see exactly what I thought was needed to maintain the Railroad.

Q. When did you begin to use "hi-rail" trucks? A. In December; I was not here but the records reflect that in December, 1963, the first "hi-rail" trucks were received.

Q. In December of 1963? A. Yes.

Q. And how many "hi-rail" trucks were there by the time you came? A. Twelve, sir.

Q. How many do you have now? A. Twelve, sir.

Q. You say these "hi-rail" trucks have contributed substantially to the effectiveness of the operation of your Maintenance of Way Department? A. Very much.
183 Q. If you didn't have them, how many employees would you require over what you presently require?

Mr. Devaney: Your Honor, I object. I don't see why the question is relevant. If he didn't have them, it's contrary to the fact that we do have them.

The Court: Well, he testified that the addition of "hi-rail" trucks with stationary power tools located on them permitted a reduction of force. I think certainly it may be inquired into.

Mr. Devaney: I don't object to that, Your Honor, but I object to the form of the question which is put in the terms of how many—

The Court: How many would you otherwise need?

Mr. Devaney: Right.

The Court: It's intelligible to me.

You may proceed.

By Mr. Shapiro:

Q. Did you understand the question? A. Yes,
184 sir, I understood the question.

It would be difficult for me to say. My experience with motor cars, I know that you are limited to the territory you can cover. They are expensive to maintain. They are difficult to get over the railroad, because no contact with the dispatcher. They are dangerous. You are quite limited in the tools you can carry on a motor car. They are small and you are limited to the small hand tools and the number of men you can carry is quite limited. I think it would be very difficult for me to say just how many, but I think it would be many.

Q. A substantial number? A. A substantial number, yes, sir.

Q. So that, at least by April of 1964 when you came, the presence of the "hi-rail" cars made it clear that the Railroad could effect a substantial reduction of requirements from pre-strike requirements? A. Yes, sir.

Q. Do you have Exhibit BB before you, sir, the chart? A. Yes, sir.

Q. Now, you have testified that if the six additional positions listed for the Maintenance of Way Department in Column 6 were filled, you would be fully able to comply with the collective bargaining agreement; is that
185 right? A. Yes, sir.

Q. So that if there is any necessity for departing from the agreement, it's in connection only with those six positions; is that right? A. At this time, yes, sir.

Q. What are the six positions? A. They involve one foreman and the remaining, for the bridge gang, a bridge foreman, one track foreman, one bridge foreman and four bridge men.

Q. What are the requirements for a bridge man? A. I'm not sure of the apprentice program that we had on this Railroad but it requires several years experience and he

has to be familiar with heavy timbers and in their framing, and he has to be familiar with pile driving generally. He has to be familiar with repairs to concrete, handling of pipe, repairs to steel bridges, that is, bolting, riveting, painting and general maintenance of bridges and also of buildings.

Q. And bridge men are specialized construction workers; is that really what they are? A. Yes, sir.

Q. And the other positions that you had listed, as a Foreman and Assistant Foreman; is that it? A. No, sir.

One was a track foreman—this was not related to
186 the bridge gang.

Q. I see.

The Court: A bridge foreman and a track foreman and four bridge men?

The Witness: Four, that's right, sir.

By Mr. Shapiro:

Q. The bridge foreman was a more expert construction worker? A. Yes, sir. He is just a good bridge man, workman, and has the ability to supervise.

Q. Now, are you carrying on any contracting out program in the Maintenance of Way Department? A. Yes, sir. We are contracting this bridge work that we mentioned, and then we are doing some contract track work where we have a big job such as an industrial park development that has a lot of drainage and grading and paving and track work; also for piggyback facilities that has a lot of fencing, acres of draining—I mean, acres of paving and a lot of grading; that type of equipment that we do not own and track work which is incidental to this other work. We have contracted and are contracting that type of work, yes, sir.

187 Q. Now, in your experience on the Southern, can you tell us whether the type construction you have just described to us would be contracted out in the normal course of the Railroad's business? A. Yes, sir.

Q. So that we're not concerned with any contracting out work that deals with the normal operation of the Railroad, but rather with a special construction program when you refer to contracting out? A. Yes, sir.

Q. And if you had the six additional men that are listed on Exhibit BB, the little bridge work that you are now contracting out would be also done by the regular staff; is that right? A. Yes, sir.

Q. Now, has the Railroad acquired substantial quantities of new equipment since you came to it in April? A. Yes, sir.

Q. So that some of the reduction in force requirements have occurred since you came to the Railroad? A. Yes, sir, a considerable amount, other than the "hi-rail" cars, have been acquired in the last five or six months.

Q. Could you—are you sufficiently expert to make
188 an estimate of the number of employees who are no longer required, as compared with pre-strike operations, as a result of the equipment acquired since April of 1964? A. I think it would require taking each unit and making an estimate of what the unit does. I think I can do that, yes, sir.

Q. You have before you some notes, do you not? A. Yes, sir.

Q. What are they? A. I had some notes referring to the number of foremen I had and number of employees at various dates, and supervisory people.

Q. Do you have anything in your notes concerning the pre-strike requirements? A. Only the total number of employees, and as broken down by gangs, number of men per gang and the locations; yes, sir, I do have that.

Q. Would it be possible for you to give us from your notes within a brief period a more precise statement of the number of employees who would no longer be required as a result of the equipment acquired since April of 1964? A. As an example, extra gang No. 4, which is a timbering and surfacing gang, in January, 1963, this gang had a

total of 30 laborers and 10 machine operators and
189 various others, making a total of 48 men. And the gang that replaces that gang with the new tampers has approximately 12 laborers and 8 machine operators and has about four times the capacity to do work that this former gang had. So I don't know how we would say. Certainly we have eliminated 28 men but they are doing four times the work, so this work won't have to be repeated; so actually, it's more men than that eliminated.

These new tampers have an electronic beam to pull the track to surface and cross level and tamp electronically, and the operator only has the function of stopping the machine and does this in about five seconds per tie, where the former machines required 22 to 23 seconds per tie. It does a better job; it has a better tamping principle. It requires us to raise the track a lot less and we don't have to make as high a raise as we formerly made. This requires much less ballast and requires, of course, fewer people unloading the less ballast. We don't have to have these people that did unload the stone in front of this gang.

The Court: I'm not sure I understand why it requires less ballast.

190 The Witnes: The former machine did not have the capacity to put the ballast under the ties unless a high raise was made, that is, three inches or something like that. And the new machine will raise the track one inch and you get just as good a surface, in fact better, and you don't require that two inches of additional ballast, which amounted to 350 tons per mile or so, and this required a lot of people to unload the ballast. And we don't have any good ballast cars. We use hopper cars to unload ballast, which is not specialized cars.

By Mr. Shapiro:

Q. Now, when did you acquire this special equipment? A. This has been most recent, in the last of October.

The Court: What is this ballast, Ojus rock?

The Witnes: Yes, sir, Ojus stone.

On the same gang, we have a new regulator that will almost completely dress a switch. This is an operation that was formerly done by hand. It would take six men three or four hours to properly dress a switch and this machine does about 75 or 80% of that work. And they
191 formerly had the same machine but—had a machine but it did not do this function. So we have the same operator we formerly had but are able to eliminate some people in this respect.

We have an attachment to a liner that will line switches. This formerly required six or eight men with jacks and was a very difficult and time-consuming job. And now we can do this operation with the one liner operator, who was formerly assigned, plus one man.

We have a machine that doesn't have an operator on it. It runs completely automatically and sweeps the ballast off the tie plates and, as ties fall down, this formerly required quite a few people to get them up because the ballast would get between the rock—between the rail and the tie plates. This machine, as I say, is completely automatic and doesn't have an operator and it eliminates this need for a lot of people to get up the so-called downed ties and get the rock out from under it, between the rail and the plate. This is a real problem with us.

By Mr. Shapiro:

Q. When did you acquire these machines that you have discussed? A. The ballast regulator—

192 Mr. Milledge: Excuse me, Your Honor.

It seems to me that all of this is irrelevant to what is presently before the Court. The request is for some deviations from the contract and I don't—it doesn't seem to me that what we ought to be litigating here is why more or less men are needed. They are asking for certain deviations.

I mean, I don't think we are here today to litigate how many men different machines, how many jobs are ultimately in the long run going to be lost or not. Certainly I'm not prepared to litigate that part but only as to what may or may not be a reasonable request as a temporary deviation from these contracts. And I think a small degree of explanation of why they are not making other requests at the time is of interest, but this unlimited discussion, it seems to me, puts a different character on the whole litigation.

The Court: Well, this may be substantially correct but it was approached in this manner on direct and I think the Government counsel has a right to cross-examine along this same line.

193 Mr. Milledge: All right, just as long as our position is—

The Court: I think he is somewhere near through with the subject.

Mr. Milledge: Just as long as it's understood that the organizations' position is preserved. We are just here to defend against some temporary changes, not some—what the long-range future impact of change of machinery, and so forth. I think that the context of what's before the Court makes that clear, does it not?

The Court: Yes, sir.

By Mr. Shapiro:

Q. Just one final question:

When did you acquire these machines you have been discussing? A. We designed and built the sweeper back in July. And the ballast regulator was acquired in July. And some of the other machines that we have described earlier were acquired in May and June of this past year, of this year.

Q. Have there been any significant acquisitions of

194 labor-saving machines that the Railroad formerly did not have, in addition to the "hi-rail" cars, in

December, 1963, which were acquired before May of 1964? A. Yes, sir. They modified their smoothing machines which were able to do a much better job and, of course, required less smoothing.

Q. So that significant numbers of machines were acquired prior to May of 1964? A. Some, yes, sir.

Mr. Shapiro: I have no further questions.

Further Cross Examination

By Mr. Milledge:

Q. Mr. Davidson, do you have a bridge gang now? A. Yes, sir.

Q. How many bridge gangs do you have? A. We have one bridge gang.

Q. One bridge gang? A. Other than the contract bridge gang described earlier.

Q. And the contract bridge gang is working on what project at the moment? A. A bridge at the twelve mile post. They are redriving the—

195 The Court: At bridge, what?

The Witness: A trestle at the twelve mile post. This is just twelve miles out of Jacksonville. They are redriving the timber trestle south of Bowden.

By Mr. Milledge:

Q. How much longer would it take to complete that job? A. Approximately a month.

Q. Now, other than that job, you are able to operate under the contract? A. No, sir. We have several rebuilding jobs that we had planned to use this gang for, until we could acquire a gang to replace them.

Q. Well, how long have you had your present bridge gang? A. Which? The maintenance gang is our—

Q. You have one bridge gang? A. Yes, sir, we've had for some months, probably October or November of 1963.

Q. And in the meantime, you have increased, let's see:

In October of 1963, you had, I think you have told us,
196 71 people; right? A. Yes, sir.

Q. So you had quite a few track maintenance gangs? A. Yes, sir.

Q. And you had one bridge gang? A. Yes, sir.

Q. And you increased your track maintenance gangs quite substantially since then? A. Yes, sir.

Q. But you—now, how long have you been using this contract gang? A. Approximately four months.

Q. And before that, you did all the bridge maintenance with just your own one gang; is that right? A. All that was being done, yes, sir.

Q. How did you acquire the bridge gang personnel that you do presently have? Not the contract but your scope? A. Well, we've had a returnee and the others were recruited as bridge men.

Q. When was it that you joined the Florida East Coast? A. In April, 1964.

Q. Can you convert some of your personnel that are in your road maintenance, that is, your right-of-way
197 maintenance, into bridge gang people? A. We are looking into this and, as yet, we haven't been successful to find the people with the proper experience.

Q. You have, what is it, 115? A. Yes, sir.

Q. But you don't have any of those who are competent to handle a bridge gang? A. They are needed in the jobs they are in also.

Q. What it amounts to—how many gangs do you have altogether? A. We have eight gangs.

The Court: One of which is the scope bridge gang; right?

The Witness: Excuse me, sir. We have nine bridge—I mean, nine gangs, one of which is the scope bridge gang, yes, sir.

By Mr. Milledge:

Q. And what you need to do is to get up enough men to add another gang? A. Yes, sir.

Q. All right. And now for how long have you been at this 115 man level, or essentially that? A. For several
198 months; we've made progressively an increase in the number of employees each month.

Q. Do you have a month-by-month tabulation? A. No, sir, I do not.

Q. Well, you have given us October of '63. What's the next tabulation you have after that? A. Let's see. I have May of '63, we had 11 men. And in October—

Q. Excuse me? A. May of '63, we had 11 men, and in—

Q. I don't understand. Oh, May of 1963? A. May of 1963, we had 11.

Q. I was thinking of May of '64. What do you have for '64? A. I don't have May of '64, sir.

Q. Well, for how long—you've been in charge of this situation. For how long have you had substantially the same number of people? A. About two months.

Q. All right. Well, let's go back to May of this year, 1964. How many did you have then? A. I don't have that figure, sir. It was less than this, probably 15 to 20 less.

The Court: This means you have had 115 since
199 about the first of October? Is that it?

The Witness: Yes, sir.

By Mr. Milledge:

Q. And you think you had about a hundred back in May? That's what you would guess? A. Yes, that would be my estimate.

Q. You are adding men, at what? At the rate of two or three a month? Is that the way you are going? A. Yes, sir. Of course, this doesn't represent the total men. We lose some men too, of course. This is the net.

Q. Tell me about that May of '63 again. I did not write that down. A. 11.

Q. By October of '63, you had 71; right? A. Yes, sir.

Q. You don't, you can only estimate for us about May of this year; is that right? A. Yes, sir.

Q. Which you say you had about a hundred then. And you are up now to a hundred—a month ago, you were up to 115? A. Yes, sir.

200 Q. And you need six more people? A. Yes, sir.

Mr. Milledge: That's all I have.

The Court: Anything further?

Redirect Examination

By Mr. Devaney:

Q. Mr. Davidson, you said the "hi-rail" trucks, the first "hi-rail" truck was received in December of '63. Were all twelve of them received in December of '63? A. I believe, I'm not sure, sir, I think they were finally received in January, the total of twelve. They were in operation in January.

Q. Now, the equipment which these trucks might carry had that all been—had the trucks been fully equipped at the time they were received or did this take additional time? A. This took additional time, sir.

Q. Could you give us any idea when the twelve trucks were fully equipped? A. They were fully equipped before May of '63, so I would guess probably by March that they were fully equipped, sir.

201 Q. Now, you said that the number of people had increased from 11 in May of '63 to 71 in October of '63 to the present 115.

Prior to your having the maintenance gangs, how was this work performed? A. The maintenance was performed by contract gangs.

Q. And as you have acquired the people, you have taken over the performance of the work that had been contracted out? A. Yes, sir, we've eliminated the gangs as quickly as we could.

Q. The only work that is still being contracted out then is this bridge work that you have testified about? A. Yes, sir.

Mr. Devaney: No further questions, Your Honor.
Mr. Shapiro: Nothing further, Your Honor.
The Court: You many come down.

(Witness excused)

Mr. Devaney: Call Mr. Wyckoff, please.

202 **Raymond W. Wyckoff**

having been produced and first duly sworn as a witness on behalf of the Defendant, testified as follows:

Direct Examination

By Mr. Devaney:

Q. Will you for the record please, state your name? A. Raymond W. Wyckoff.

Q. Are you employed by the Florida East Coast? A. I am.

Q. What is your position? A. Vice President and Director of Personnel.

Q. Mr. Wyckoff, I hand you Defendant's Exhibit BB. Now, on this exhibit, Mr. Wyckoff, a total of 114 positions are indicated as having been bulletined; is that correct? A. That's correct, yes, sir.

Q. Now, did you, in your official capacity, receive responses from any of the Labor Organizations concerning the jobs which were bulletined? A. Yes, several of the Labor Organizations, the General Chairmen, wrote me and advised that their members were on legal strike and that they had been instructed not to bid in the jobs.

203 Q. Mr. Wyckoff, I hand you, this is the attachment to the Application for approval of employment practices, and ask you if these documents which were attached to that Application and marked as Carrier's Exhibits 1 through 14 are a portion of the letters you have received from the various organizations? A. Yes, that is correct.

Q. Now, I hand you, Mr. Wyckoff—

Mr. Devaney: Perhaps we ought to have these marked for identification.

The Clerk: FF.

(The referenced material was marked Defendant's Identification Exhibit FF.)

Mr. Devaney: If we may go off the record just a minute: What I wanted to do, Your Honor, was to include those Exhibits 1 through 14 and have them renumbered so they will fit in with the numbering of the exhibits. It's immaterial how we do it, whichever will be the easiest way.

The Court: Where did they get the numbers 1 through 14?

204 Mr. Devaney: They were attached to the Application we filed, Your Honor, and for that purpose were numbered Carrier's Exhibits 1 through 14.

The Court: Are they of similar content?

Mr. Devaney: Yes, they are.

The Court: Mark them all FF, then.

Mr. Devaney: All right.

The Court: Let the record show they are removed from the Application.

Were they attached to Mr. Wyckoff's affidavit or to the Application itself?

Mr. Devaney: No, Your Honor, they were attached to the—the affidavits were actually attached to the Motion, but two documents were filed at the same time; so while they were not physically attached to the—

The Court: They finally became lodged in the Court file here.

205 Mr. Devaney: That's correct.

The Court: And they had numbers 1 through 14 on them.

Mr. Devaney: 1 through 14, that is correct.

The Court: Well, just let them all be under one number, FF, at this hearing. If you want them to have additional numbers, they can be FF-1 through FF-14; is that—

Mr. Devaney: That's very fine.

By Mr. Devaney:

Q. Now, Mr. Wyckoff, in addition to the ones which will be renumbered as FF-1 through 14, are these additional letters which were received from the Unions? A. Yes, they were.

The Court: Received from whom?

Mr. Devaney: From Unions.

The Court: Oh, from Union Chairmen, Local Chairmen; I see.

206 By Mr. Devaney:

Q. Tell us which Unions? A. The first letter is a letter addressed by Mr. C. A. DuPont, who is President and General Chairman of Local 888 of the International Brotherhood of Electrical Workers. That letter is dated November 10, 1964.

The second letter is a letter addressed by Mr. J. E. Dubberly, General Chairman of the Brotherhood of Railroad Signalmen of America. That letter is dated November 9th, 1964.

Mr. Devaney: I request that the Clerk remove the letters and incorporate them and mark them as Defendant's Exhibits FF-1 through 16.

By Mr. Devaney:

Q. Now, Mr. Wyckoff—

Mr. Shapiro: Mr. Devaney.

Mr. Devaney: Yes, sir.

Mr. Shapiro: The letters that you have there were part of your Application?

207 Mr. Devaney: Yes.

The Court: These last two are additional?

Mr. Devaney: Except the last two.

Mr. Shapiro: Except the last two.

The Court: Mark them 1 through 16, part of the same

exhibit; is that all right? That would be as part of the exhibit.

(The referenced instruments were marked Defendant's Exhibits FF-1 through FF-16 for identification.)

By Mr. Devaney:

Q. Now, in addition to letters from the Unions, Mr. Wyckoff, did you receive responses from individuals? A. Yes, we received a number of such responses.

Mr. Devaney: I ask that this be marked for identification as GG.

(The referenced material was marked Defendant's Identification Exhibit GG.)

By Mr. Devaney:

Q. I hand you, Mr. Wyckoff, the document marked for identification as Defendant's Exhibit GG. Is that the
208 portion of the letter you received in response from individuals? A. Yes, it is basically a form letter used by most of the individuals who wrote.

Mr. Milledge: They are all the same?

Mr. Devaney: They are all signed by and addressed to different people by different individuals. Most of them involve a form, which is a mimeographed form, but there are a few letters, rather than the mimeographed form, which are included. But they are to the same effect as the form letter.

Each states that the organization is on a legal strike and, because of this, they cannot report for work.

For purposes of further identification, Your Honor, this consists of 24 individual refusals by persons to report for work.

I have left to be typed a list of the letters, identifying them by date and name, and will furnish that as soon as it is available.

The Court: All right; various ones of these non-operat-

ing Unions. They are scattered around through the
209 Unions; they are not arranged with any particular—

Mr. Devaney: No, and I don't even know whether they are all members of this same Union. I believe, this I don't know, they are from different individuals and they are addressed to different officials of the Railroad.

I move that FF and GG both be received in evidence.

Mr. Milledge: No objection.

Mr. Shapiro: No objection.

The Court: Mark both of them in evidence.

(Thereupon, Defendant's Identification Exhibits FF and GG were received and filed in evidence.)

The Court: And I gather that you are going to attach to GG a list of them?

Mr. Devaney: Yes, Your Honor.

The Court: Just a memorandum.

210 Mr. Devaney: Just as a matter of making it easier to see what is involved.

The Court: Yes, sir.

Mr. Devaney: I ask that this be marked for identification as HH.

(The referenced material was marked Defendant's Identification Exhibit HH.)

By Mr. Devaney:

Q. Mr. Wyckoff, I hand you a document which has been marked for identification as Defendant's Exhibit HH.

Did you receive this in the course of your official duties from one of the other officials of the Railroad? A. Yes, I did.

Mr. Milledge: In case there is any doubt, there's no contention by the organizations. The organizations are on strike. They remain on strike and, by and large, their membership has not returned to work. So I don't think—I think that, early in the opening statements, it was stated that two or three people from the organizations that bid

jobs for one, or something like that; that, to our knowledge, is correct and there is no dispute over the fact that
211 the organizations remain on strike and their membership, by and large, have not returned; if that will help expedite the proceedings.

Mr. Devaney: I offer Defendant's Exhibit HH into evidence.

Mr. Milledge: No objection.

The Court: May I see that one?

(Thereupon, Defendant's Identification Exhibit HH was received and filed in evidence.)

By Mr. Devaney:

Q. Mr. Wyckoff, I hand you Defendant's Exhibit HH. Would you examine that, Mr. Wyckoff, and tell me whether the person who wrote this letter had submitted a bid for one of the jobs which was bulletined? A. Yes, he was one of the three bidders. He became assigned to a job as a clerk-operator at Hialeah. We contacted him and asked him to take his physical examination. Before he did so, he contacted us, said he had fallen off of a ladder and had injured himself while painting his house. Then, a couple days later, he contacted us and said he was on strike and could not cross the picket line. And then he wrote this letter confirming it.

212 The Court: Well, that letter is confirming what he—well, now, this last, you say he contacted you; did he contact you or someone else?

The Witness: Not me personally, no, sir. He contacted—

The Court: You don't make any point of this as to it being hearsay?

Mr. Milledge: No. I mean, the people haven't returned.

The Court: This letter confirms what somebody told you he told them?

The Witness: That's correct.

The Court: All right.

Mr. Milledge: It's just a detail of a general thing, of which there is no contest at all.

The Court: Well—

213 Mr. Milledge: But—

The Court: It makes a difference to know—do you know whether he is a member of the Clerks' Union or not?

The Witness: He isn't a member of the Clerk's Union. This was the Telegraphers' organization.

The Court: Oh, I'm sorry, I thought it was the Clerks'. Well, do you know whether he's a member of the Signalmen?

The Witness: I don't know whether he's a member or not. I assume he is.

Mr. Shapiro: Your Honor, I wonder whether we could work out some form of a stipulation rather than to go on with this, to the effect that eleven labor organizations, eleven non-operating organizations, are on strike. Their membership, for the most part, is adhering to the strike. They are not crossing the picket lines and they are not responding to the bulletining; rather than go through all this.

214 Mr. Devaney: Well, this was—we had put in what we intended to put in, Your Honor. We felt that the record must show the efforts that we had made to bulletin the positions and the fact that the people did not return to work in response to these bulletins. We have done that and—

The Court: It's in then?

Mr. Devaney: That's correct.

The Court: All right.

By Mr. Devaney:

Q. Now, Mr. Wyckoff, turning again to Defendant's Exhibit BB, are you familiar with the operations and the requirements of the Accounting Department? A. Yes, I am.

Q. Would you tell us, Mr. Wyckoff, what some of the

reasons are for the reduction of requirements in the Accounting Department, which is shown on this exhibit as 10? A. Well, for one thing, a number of reports that were prepared in the past, statistical reports, have been discontinued. They weren't essential reports and we found
215 we could do without them.

For another thing, much of the remaining reports have been transferred to the machine accounting bureau for preparation. They are prepared on the basis of key punch cards that are prepared at the Bowden Yard or the Hialeah Yard. Those key punch cards, when they have served the needs of the Transportation Department, are forwarded to the Accounting Department and the same cards are used for their purposes.

Q. In other words, they don't have to re-type or reassemble the information? A. That's correct. It is already on the cards.

Q. And it would be collated by machines, by running these through a machine rather than an individual doing it? A. That's correct.

Q. Now, I note that 17 jobs were bulletined in the Accounting Department, Mr. Wyckoff. Did any—were any of these positions filled by people accepting the—or in response to those bulletins? A. No, not from the strikers.

Q. Now, with the the 42 people which they had, was the Accounting Department able to perform the work required without having the employees cross over either craft
216 lines or seniority districts? A. No, they could not nor could they do it without the use of supervisory personnel.

Q. Why is it that they are not able to do so, Mr. Wyckoff? A. Most of the jobs in the Accounting Department are jobs quite skilled, requiring quite highly skilled applicants. It takes a considerable period of time to train them and, therefore, it's necessary to use the supervisory personnel to do the work or use the individuals that are available and let them cross seniority districts in order to do the work.

Q. What steps, Mr. Wyckoff, to your knowledge have been taken to secure personnel for the Accounting Department? A. We have attempted to recruit personnel from other railroads, people who are furloughed on other railroads. We've attempted to recruit personnel locally.

Q. Earlier, Mr. Wyckoff, we mentioned, as an example, the Rate and Division Clerk. Is this a person in the Accounting Department? A. Yes, he is.

Q. Could you tell us specifically—

The Court: What person are you talking about?

217 Mr. Devaney: Rate and Division Clerks, Your Honor.

The Court: Yes.

Mr. Devaney: Could you tell us—

The Court: I have difficulty hearing you about half the time. As I told you before, you have a very soft and pleasant voice but not one that carries out very far.

Mr. Devaney: I'll try to speak a little louder, Your Honor.

The Court: The last time you said that you had a throat ailment. This time, I hope—

Mr. Devaney: No, it isn't that. I can't blame it on anything but me.

The Court: All right.

By Mr. Devaney:

Q. Can you tell us, Mr. Wyckoff, specifically with regard to the Rate and Division Clerks, what steps were

218 taken to provide the needed scope employees for this work? A. Yes. We—well, for one thing, we contacted the Central of Georgia Railway, who some months ago had a reduction in force. We thought perhaps there were some furloughed Rate and Division Clerks there that we could contact. I personally spoke to the Director of Personnel of the Central of Georgia and he contacted various individuals, not only in this craft but in all crafts; but because of their Union affiliations, they would not come to work for us.

We also contacted the S&A Railway, the Director of Personnel on that road. In fact, we sent a man from St. Augustine to the S&A Railway to solicit personnel.

When we found that we couldn't secure experienced personnel, we had to train our own so we recruited three individuals who had some background in tariff work. We took a supervisory man and put him full time with these three individuals in an effort to train them, but that's quite a prolonged process.

I believe the Government has recognized it takes at least two years to train a Rate and Division Clerk.

Q. What has the prior experience of the Railway been with regard to the period of training required for a Rate and Division Clerk, Mr. Wyckoff? A. Well, in the
219 past, it has taken several years to train a man. Now, based on intensive training such as we are engaged in at this time, I would say a minimum of two years.

Q. Now have similar steps been taken with regard to all of the different positions in the Accounting Department? A. Yes, we are attempting to train individuals to fill those positions.

Q. And why is it still necessary to use supervisory personnel to perform part of this work? A. Because the individuals that are in the process of being trained simply can't do the work themselves. They don't have sufficient experience to do it, experience and training.

Q. Now, does the, or would the lack of your ability to fully conform with the agreements, if you could only use the people you had, would this have any impact on the operation of the Railroad? A. Yes. You're speaking now of strictly the scope employees?

Q. Right. If you were able to use the scope employees that you have only in strict accord with the agreements and you were not able to use scope employees across
220 seniority districts or to use supervisory people to perform some part of this scope work, what impact would this have on the operation of the Railroad? A.

Well, much of the work in the Accounting Department, a good percentage of the work, would have to remain undone. And of course, obviously that's the means by which we secure the revenues to continue operation.

Q. Does the Accounting Department handle any other reports? A. Yes, there are various Governmental reports, ICC reports, that the Accounting Department prepares at various times of the year.

Q. Now, in the Personnel Department, I notice that you had two scope employees prior to the strike. You now have three and you bulletined one position.

Could you tell us what the reason for the increase in the number of people in the Personnel Department is? A. Well, I've transferred some of the work from other departments to my department, as I have a right to do under the Clerk's agreement.

Q. And this is the reason, then, for the— A. The increase in personnel.

Q. —the increase? A. That's correct.

221 Q. Now, in the Personnel Department, I notice that you bulletined one job. Did you have any response to this bulletin? A. No, we did not.

Q. Now, how is the work for which you issued this one bulletin now being performed? A. By supervisory personnel.

Q. If you had obtained this one additional person, would the scope work in the Personnel Department all be performed in accordance with the agreement? A. Yes, all the scope work. Of course, much of the work in my department is of an excepted nature and I have a right to have the excepted personnel perform it.

Mr. Devaney: I ask that this be marked for identification as—

The Clerk: II.

(. . . The referenced material was marked Defendant's Identification Exhibit II.)

By Mr. Devaney:

Q. Mr. Wyckoff, I hand you a document marked for identification as Defendant's II. Would you tell me, sir, whether this document was prepared under your
222 direction and supervision? A. Yes, it was.

Q. Could you tell us, without going into any of the details, but purely for identification, what this exhibit consists of? A. It shows the total number of applicants that we've had by months, commencing with January of '63; those selected for processing; those actually hired, and those which failed to report after they were hired.

The Court: That's in all departments?

The Witness: Total for the Railroad, yes, sir.

Mr. Devaney: I move that Defendant's Exhibit II be received in evidence.

The Court: Have you given these gentlemen copies?

Mr. Devaney: Yes, I have, Your Honor. They are now looking at them.

Mr. Milledge: If I might ask a couple questions on voir dire.

223 The Court: Well, would you want to wait until Mr. Shapiro gets through reading it?

Mr. Milledge: Oh, yes, sir.

The Court: As soon as he's ready, why, you can go ahead.

Mr. Shapiro: I'm ready, Your Honor.

The Court: All right, proceed, Mr. Milledge.

Voir Dire Examination

By Mr. Milledge:

Q. Does this come from payroll records? A. No. These people were not on the payroll, in some cases. These are the total applicants, in the first column, so they not all would be on the payroll.

The next column shows those selected for processing from those applicants.

The next column shows those hired. Now, those are the ones who would appear on the payrolls.

and the last column shows thase who failed to report.

Q. None of this—

224 The Court: After being hired?

The Witness: That's right, sir.

By Mr. Milledge:

Q. But it doesn't show this: You have an asterisk on here. This does not show former employees who returned; is that it? A. That's correct. These are just new people.

Q. How many former employees do you have? A. Oh, I don't have the figures.

Q. Non-ops? A. I don't have the figures with me.

Q. Would it be the difference between 308 and 390; is that it? On BB? Is that what— A. No. You see, 308 is just for the year '64 that were hired. There were 542 hired in '63. Now, simply because we hire a man doesn't mean that he's going to remain with us permanently. So not all of the people that we hired are still in the service.

The Court: Actually, only 390 are in service, according to Exhibit BB; isn't that right?

The Witness: That's correct, sir.

225 By Mr. Milledge:

Q. From what records was this compiled? A. From our application forms, our records of individuals sent to the doctor for examination, payroll records, those that actually reported and appeared on the payroll; all the records we had available.

Q. Well, this tabulation was prepared for this hearing? A. That's correct.

Q. You haven't been maintaining this tabulation as a tabulation from the beginning of the strike? A. No, I have not.

Mr. Milledge: That's all the questions I have on voir dire.

Further Voir Dire Examination

By Mr. Shapiro:

Q. Was this prepared under your direction? A. Yes, it was.

Mr. Shapiro: I have nothing else.

The Court: The source of the material is various records but you are sufficiently familiar with the records and with the exhibits to offer it as a correct and true state-
226 ment of what it purports to be?

The Witness: Yes, sir. We took each application form that we had accumulated over the period.

The Court: It took time to assemble it—

The Witness: That's right.

The Court: —and make some notes and then finally put it in final form?

The Witness: That's correct.

The Court: You think your records on detailed examination would substantiate it?

The Witness: Yes, sir.

The Court: Is there an objection to the exhibit?

Mr. Shapiro: No objection by the Government.

Mr. Milledge: No objection.

227 The Court: Mark it in evidence as II.

(Thereupon, Defendant's Identification Exhibit II was received and filed in evidence.)

The Court: Is this in mimeographed form?

Mr. Devaney: No. I do have one extra copy of it, Your Honor.

The Court: Well, I don't want to take copies you need. You may want this for your examination. I just thought, if you had it in the same form as the earlier one, BB, I could have it.

Mr. Devaney: This is an extra copy, Your Honor. I have one left.

The Court: This isn't needed?

Mr. Devaney: No, that is not needed.

The Court: For your examination of the witness?

Mr. Devaney: That's correct.

228 The Court: Or opposing counsel.

Further Direct Examination

By Mr. Devaney:

Q. Now Mr. Wyckoff, I notice—

The Court: This also shows in the number—well, the number of applicants isn't broken down into ops and non-ops but it shows the number selected, both ops and non-ops, and number hired and number failed to report?

The Witness: That's correct, sir.

The Court: Actually, in this hearing, we are only concerned with the non-ops column.

The Witness: Those actually selected and hired, yes, sir.

By Mr. Devaney:

Q. Now, Mr. Wyckoff, I notice that the number of applicants that you had varies from 8 in February of 1963 to a maximum of 121 in August of 1963.

I note that in January of 1964 you had 242 applicants and in February of 1964 it had dropped to 51.

229 Do you have any knowledge, from the people who did report or to whom you have talked, as to what would account for this rather precipitous drop in the numbe of applicants? A. Well, from the information that I have secured from the applicants when they come in, apparently each time there is a proceeding involving the former employees returning to work, the applicants lose interest in trying to secure employment with the Railway, figuring it's only temporary employment.

By the same token, when we have a series of acts of sabotage such as dynamiting of the bridges that occurred, and so forth, the number of applicants is drastically reduced.

Q. Now, what is the procedure, Mr. Wyckoff, when people make application, in the first column—in other words, where an applicant comes in, does he come to your office ordinarily? A. The majority of them come to my office. There are a few that are processed on the Southern Zone at the Terminal Superintendent's office, but I see all applications eventually.

Q. Now, after you have examined the applicant and he has filled out the application form, what next is done
230 with this person before he actually goes to work? A. Well, those on—those that come through my office, I personally talk to.

First, I insure that they are the type of individual that we want in the employ; not one with a bad criminal record or dishonorable discharge from the Armed Forces, anything such as that would make the individual undesirable and, of course, we would bar him from the service.

After we find that he does meet our basic requirements, then, based on his prior training, skills, and so forth, we fit him into the department that he can best be utilized. Then he is sent to that department to make sure that they can utilize his skills. If they can, they send him back and we send him to the doctor for an examination to make sure he meets our physical requirements.

Q. Now, do the various departments reserve the right to examine and/or test the people that you send over to them? A. Oh, yes, in practically every case they give them some sort of examination or test to insure that the individual is truthful with respect to his prior experience.

Q. Would this include clerks as well as the craft people, or would it be limited to the craft people who would
231 be tested? A. No. For example, an individual endeavoring to secure employment as a stenographer, naturally, a test would be given to insure that the individual could take shorthand and type, and perform typing.

Q. Then, after the person passes the physical examination, that person is then ready to be placed on the pay-

roll; is that correct? A. That is correct. He is then referred back to the department and they start him to work.

Q. And these people who fail to report, what does that mean specifically? A. Well, that means, after he completed all of the employment procedures, including the physical examination, we just didn't hear anymore from the individual.

Q. He never came to work? A. That's right.

Q. Now, these who failed to report, are those people included in the number hired? A. Not in the number hired, but they are included in the number selected.

Q. Now, Mr. Wyckoff, if we may go back a moment to Defendant's Exhibit BB, do you still have that before you? A. Yes, I do.

Q. Would you look at the top line, at the Mechani-
232 cal Department.

Before that, let me ask one preliminary question: Was the information on Exhibit BB, after it was received from the various departments, actually assembled and put into this exhibit by you, or under your direction and supervision? A. Yes. I contacted each of the department heads, requested the information, and then asembled it in this form.

Q. Now, under the first line of Mechanical Department (Motive Power), under "Manufacture of Bearings" is the figure 6. Is that included in the 82 which represents the reduction of requirements? A. Yes, it is.

Q. Now, also on Exhibit BB, Mr. Wyckoff, the number of individuals on the payroll was as of November 2nd. Since that time, approximately one month, has the total number of employees increased, since November the 2nd of '64? A. Yes, they have.

Q. Could you tell us where they have increased, if you have that, and by how many? A. Well, in the Mechanical Department, we have an additional 5, making a total of 141 now instead of 136.

In the Maintenance of Way, we have 117 now in-
233 stead of 115.

In the Transportation Department, we have 64 now instead of 57.

In the Accounting Department, we have 41 instead of 42, which gives a plus figure of 13.

Q. So that the total of that column would now be 403, right? A. That is correct.

Q. Mr. Wyckoff, in the Accounting Department again, is this work largely the same as accounting for any other industry? A. No. Accounting in a railroad field is unique. You can hire an accountant who has had some experience on the outside, outside industries, but that simply serves as a basis on which his training can progress with the Railroad.

The various reports and accounting procedures on a railroad, to my knowledge, have no equal in the outside industries.

Q. Now, in the over-all hiring, Mr. Wyckoff, for the entire Railroad, this is all under your department?

The Court: But still, going back to that other thing, there are many accounts that you have to maintain and many reports that you have to make, but it's still
234 done by accepted accounting practices, isn't it?

The Witness: By practices specified by the Interstate Commerce Commission, yes.

The Court: Yes, sir, but you don't deviate from what an accountant learns to do and how he goes about doing his work in making this accounting?

The Witness: No, sir. But what I was getting at, his experience on the outside wouldn't qualify him as an accountant on the Railroad.

The Court: But this outside experience might make you think that a particular item should go in one account and it would go in an entirely different account, matters of that sort.

The Witness: That's correct.

The Court: He has to learn a different—

The Witness: An entirely different procedure.

235 The Court: —a different theory in practice.

The Witness: That's correct.

The Court: But if he's a skilled accountant, it doesn't take him an enormous period of time, does it?

The Witness: Well, the training period for one who has had prior experience as an accountant obviously would be shorter than for someone who had no accounting experience at all.

The Court: That's what we are talking about, one that knew something about the job, one that knew something about accounting. We're not talking about someone who has been a bricklayer.

The Witness: Well, that's what I was getting at, sir; a man who has had prior experience as an accountant can be trained quicker than one who has had no experience at all.

By Mr. Devaney:

Q. Mr. Wyckoff, is the over-all hiring for the Rail-
236 road under your general supervision? A. Yes, it is.

Q. Can you tell us, Mr. Wyckoff, whether since the strike began and the Railroad resumed operation, have you ceased your efforts to obtain additional employees for the Florida East Coast? A. No, we have continued our efforts to secure employees.

Q. Now, what is the reason, Mr. Wyckoff, for the decrease in the additional number of employees added, that is, the rate of increase, between what occurred in the early months after you resumed operation in '63 and the rate of increase at the present time? A. Well, of course, in the early months, we didn't have any employees, so many of the jobs to be filled required limited degrees of experience and training. Now, those jobs obviously are easier to fill than jobs requiring considerable training and experience. We are at that point now. We have the jobs that are easy to

fill, they are filled. The jobs that require considerable training and experience, we have individuals training for those jobs but we can only train so many at one time.

Q. And in the course of this training, are they able to perform all of the duties of their job, if they were a
237 fully qualified person? A. No, they can only perform a portion of the duties and the supervisory men are working with them and have to perform the balance of the duties.

Mr. Devaney: No further questions, Your Honor.

Cross Examination

By Mr. Shapiro:

Q. Mr. Wyckoff, you have testified that, on the basis of Exhibit BB—do you have Exhibit BB before you, sir? A. Yes, I do.

Q. You have testified, on the basis of Exhibit BB, that you had a reduction of requirements in the Accounting Department of 10 employees.

What is the reason for this reduction? A. Well, as I said before, some of the reports that were considered necessary before the strike or were desirable before the strike, we found that we don't need so we just don't prepare the reports.

Other reports are being prepared on the basis of IBM equipment, through the use of IBM equipment, utilizing cards punched or prepared in the Transportation Department. After those cards have served their purpose in the Transportation Department, they are forwarded
238 to the Accounting Department.

Q. When did you acquire these machines that you are describing? A. Well now, the machine accounting bureau has been in existence for a period of several years but it has been a gradual process of moving work to that department.

The Court: Has there been any change—you acquired

these leased, or acquired this IBM equipment, you say, several years ago, which means to me before the strike?

The Witness: That's correct.

The Court: Has there been any change in your accounting methods or procedures since the strike?

The Witness: Yes, sir. We've expanded the equipment that we had. We've acquired IBM—

The Court: What do you mean by "expanded"?

The Witness: By acquiring IBM equipment in the Transportation Department, which we didn't have before the strike.

239 The Court: I thought your previous answer to Mr. Shapiro was that all the equipment was acquired several years ago.

The Witness: No, sir. I said—

The Court: Well, when did you acquire the additional equipment?

The Witness: We acquired the additional equipment in the Transportation Department since the strike began.

The Court: Well, when?

The Witness: Well, the exact month, Your Honor, I can't say but it would be several months after the strike began it was placed into operation.

By Mr. Shapiro:

Q. Are you familiar with the running of the Accounting Department in the Railroal? A. Generally, yes. If you are going to ask me duties of specific jobs, for the most part, no.

Q. So you are not familiar with the detailed op-
240 erations of the Accounting Department? A. In other words, I couldn't explain to you just what each individual has to do in the accounting procedures that he has to engage in to perform that work; but as to the general running of the Accounting Department, yes.

Q. How does that fall under your responsibility in the

Railroad? A. By securing employees for the Accounting Department.

Q. Do you secure employees for all departments? A. Yes, I do.

Q. Are you familiar with the operation of all departments of the Railroad? A. By the same token, generally, yes.

Q. But you have no specialized knowledge of the particular departments; is that right? A. That's right.

Q. And you have no specialized knowledge of the Accounting Department? A. That is correct.

Q. Who is the head of the Accounting Department? A. E. L. Masters is Comptroller.

Q. And is Mr. Masters the equivalent in his position within the Railroad of Mr. Hales for the Mechanical Department, and Mr. Davidson for the Maintenance of
241 Way Department? A. That is correct.

Q. But you are just testifying here from your—

The Court: Genius and general knowledge.

By Mr. Shapiro:

Q. —just general knowledge? A. That's correct.

Q. And you're not the head of the Accounting Department? A. No, I'm not.

Q. Are you an accountant? A. No, I'm not.

Q. Do you have any knowledge of requirements for educating accountants? A. I have reviewed some documents which indicate a training period, as recognized by the Government. For example, Rate and Division Clerks. In that manner, yes.

Q. Can you describe the work of a Rate and Division Clerk? A. Yes. He takes the waybill, the total revenue as shown on it, he first checks to make sure that the rate is correct. After he determines that it's correct, he prorates the revenue among the various Carriers that have been involved in the move of that particular freight
242 and apportions that part of the revenue that they are entitled to to them.

Q. Now, are there any other positions that you can describe to us? Describe the duties of, as you have just described the duties of the Rate and Division Clerk? A. Well, sure.

The Car Accountant, for example, he maintains—

Q. That won't be necessary; just answer the question. But you can describe the position of the Car Accountant? A. Yes.

Q. But you just testified a moment ago that you couldn't describe the detailed duties of employees in the Accounting Department? A. Not specifically. I can't, for example, read tariffs, which a Rate and Division Clerk has to do. I can't do that.

Q. You weren't asked whether you could do it. You were asked whether you were familiar with the duties. A. I know that he has to read tariffs, but I'm not familiar with the manner in which he checks those tariffs.

Q. How did it happen that you were familiar with the duties of the Rate and Division Clerk? A. That's one of the positions that we endeavored to secure qualified applicants for.

243 Q. Are you in a general position to describe—

The Court: That's a position he said he went to the Central of Georgia, in Savannah, to get filled. One reason, anybody that's in railroading, that job, Rate and Division Clerk, the name of it describes the duties pretty well.

The Witness: Fairly closely, yes, sir.

The Court: Which isn't always true.

The Witness: That's correct.

By Mr. Shapiro:

Q. What are the 17 positions in the Accounting Department which have been bulletined? A. One was a position of Per Diem Clerk in the Car Record Office, the duties of which consist of establishing and maintaining records of freight cars received from and delivered to connecting Carriers.

Q. Is that basically a clerical job or an accounting job? A. Well, it requires the ability to determine where a car has moved to on this road. They have to maintain
244 records of how many days it was at each point, what trains it moved on, and so forth. It's a little more than a strict clerical job.

Q. Is it an accounting job? A. Yes, it's an accounting job.

Q. Well, it's in the Accounting Department? A. That's correct.

Q. You needn't be a bookkeeper or an accountant to fill it? A. Well, that is correct, it's a specialized job.

Q. You needn't be a bookkeeper or an accountant? A. That's correct.

The next job was a Rate Revising Clerk in the Auditor of Freight and Passenger Accounts office. The requirements were a thorough knowledge of freight classifications, rates and tariff interpretation.

Q. All right. A. Also general freight accounting.

The next job was an Accounting Machine Operator. It required a thorough knowledge of railway accounting, mandatory rules, and ability to satisfactorily perform the duties hereinafter described, that is, a complete understanding of all accounting and statistical system, plans, methods and office procedures, all governed by work
245 performed in the Accounting Department. The individual had to be able to operate various units of International Business Machines, wire panel boards, operate tabulating machines, multipliers, collaters, interpreters, sorters, summary gang punch, and form burster machines.

Q. Mr. Wyckoff, I think we might speed this up if you could just go through your listing now and read the positions. A. Oh, I'm sorry. I thought you wanted to know the duties of each.

All right, the next position is a Rate and Division Clerk.

The next position was a steno-investigator.

The Court: What kind of investigator?

The Witness: A stenographer-investigator.

The Court: What's—that's not an accounting position?

The Witness: It's in the Accounting Department, yes. It investigates loss and damage of freight. The individual must know the freight claim rules of the Association of American Railroads.

246 A Freight Claim Agent.

A Chief Time Clerk—Assistant Accountant. That's a combination job.

An Accountant.

An Abstract Machine Operator.

By Mr. Shapiro:

Q. What is an Abstract Machine Operator, briefly? A. Well, he—the duties of this position include preparation of interline abstracts, correction accounts or other documents, calculating, adding machines operation incidental to compilation audit of interline accounts, typing, statistics, statements, and so forth. He abstracts or take the information from various reports and puts it in the proper form for these accounts.

A Calculating Machine Operator.

A Head Refrigeration Clerk.

An Overcharge Claim Investigator.

An Accounts Clerk.

An Assistant Head Rate and Division Clerk.

A Suspense Accounts Clerk in the interline and agency accounts bureau.

And an Accounting Machine Operator.

I believe that's all of them, unless I missed one.

Q. Now, you have also testified about the Per-
247 sonnel Department and stated that personnel requirements had been increased in that department by one.

When did that increase take place? A. Well, it has been a gradual increase of work.

The Court: Well, it couldn't be a gradual increase of one.

The Witness: Sir?

The Court: He asked you when it took place.

The Witness: What I was getting at, sir, there has been a gradual increase of work.

The Court: He didn't ask you what brought it about. He asked you when it took place.

The Witness: Well, I advertised the job on November the 2nd, I believe.

By Mr. Shapiro:

Q. I see. This is just a new requirement, November 2nd? A. That's when the job was bulletined, yes.

248 Q. This is not a pre-strike requirement? A. That's correct.

Q. What is the job? A. It's a combination job. It handles the accounts of the Timekeeping Bureau. It also does calling, crew calling.

Q. That's not connected with the strike, though? That's not a product of the strike, I take it? A. No.

Q. Now, Mr. Wyckoff, you testified—well, Exhibit II, do you have that before you, the chart? A. Yes, I have.

Q. Have you had any trouble—I'm sorry, please strike that.

How do you invite applications? A. Many, most of our supervisory people in their contacts around communities in which they live, spread the word that we need applicants, that we need people on the Railroad. By that means; by personal contacts; contacting businesses, and so forth, to see whether they have any surplus personnel or personnel that they are not using; by those means we, from day to day, attempt to get additional people.

In addition, I have contacted the personnel representatives of the various railroads that I come in contact with to see if they have any furloughed people who they

249 could refer to us.

As I mentioned before, the Central of Georgia had a drastic reduction in their employment requirements. I

contracted Mr. Certain, who is Director of Personnel of the Central of Georgia, and told him the various classes in which we needed individuals and he made an effort to secure individuals for us. But as I understand it, my later contacts with him, the Unions discouraged anyone coming down to work for us.

Q. Do you advertise for applicants? A. You mean in the newspapers?

Q. In newspapers, trade journals? A. No, we haven't.

Q. Do you have any standing procedures for inviting applications, other than your informal contacts as you have described them? A. No, that has been the standard procedure.

Q. Just informal contacts? A. That's right.

Q. Have you ever had special hiring agents help assist you recruiting labor force? A. To my knowledge, no.

Q. Do you know whether you have had them? What is the extent of your knowledge? A. Well, I've worked for this Railroad now since '48 and in that time we have never had them.

Q. So your answer is no, that there are no special hiring agents? A. To my knowledge, since '48, we have not had any. Now, prior to that, I can't say.

Q. Is there any reason to suspect you wouldn't know if there were regular hiring agents? A. I would think that I would have known it, and I've never heard of any special hiring agent being employed by this Railroad.

Q. Have you had any difficulty in securing applicants? A. Qualified applicants, yes.

Q. The question is: Have you had difficulty in securing applicants? A. We have, as you can tell from this exhibit, a number of applicants but they don't possess the qualifications in many instances that we can utilize.

Q. Do you interview each applicant for employment? A. I talk to each one that comes through St. Augustine. yes.

Q. Are some employees hired elsewhere? A. Some, as I said before, are hired on the South end of the Railroad through the Terminal Superintendent's office; but by comparison it's a small number.

Q. When you interview, you ascertain by personal interview the character of the employee; is that what your first object is? A. Well, the first thing we do is secure a written application form from the individual. Then we review that and, based on the questions and answers that he has given, we can tell whether he meets our basic requirements, as to our schooling, as to police record, discharge from the Armed Services, things such as that.

Then I talk to each one and, in many cases, in talking it over with the individuals, I find that they have given us some erroneous answers. For example, their failing to disclose a police record that they actually have, but on the application form they say they have none; things such as that.

Q. Could you tell me again the difference on Exhibit II between the category "Selected" and the category "Hired"? A. Yes. The first column are the total number of applications that we have in each month. Now, from those applications, we select certain individuals to be processed, based on their training, experience, and so forth, and also if they meet our basic requirements. We send them to the doctor. If they pass the doctor, then we actually start them to work.

Q. So the category "Selected" means just people who passed your preliminary screening? A. That's correct.

Q. I see.

Mr. Wyckoff, what is the size of your work force today? A. 403 scope employees in the non-operating crafts.

Q. And how many employees would you need to come into full compliance with the collective bargaining agreements? A. Well, we figure now that we bulletined an additional 114 jobs and we would have bulletined a fur-

ther 21 had those jobs been filled, so that would make 135 jobs, somewhere in that vicinity, 135 extra.

The Court: Well, would you take 13 off of that for the ones you filled since November 2nd?

The Witness: Yes, sir. It would be—

The Court: And end up with 122, actually; wouldn't you? Wouldn't you subtract your 403 from your 525?

The Witness: That's correct, yes, sir.

253 The Court: It would be 122?

The Witness: Yes, sir.

The Court: I gather you are about through. You are going back over prior testimony and looking for—

Mr. Shapiro: Possible inconsistencies.

The Court: It might be a good time to take a break and let you have the witness for a minute when we finish, if you want him; otherwise, you can then turn him over to Mr. Milledge.

Mr. Shapiro: Yes, sir.

The Court: Let's take a break for a few minutes, Gentlemen.

(Short recess)

Raymond W. Wyckoff

resumed the witness stand and further testified as follows:

Further cross Examination

By Mr. Shapiro:

254 Q. Mr. Wyckoff, do you still have Exhibit BB before you? A. Yes, I do.

Q. Now, do you recall testifying earlier in this proceeding—

The Court: You'd better give him the date. Is it May 26?

Mr. Shapiro: On May 26, 1964. This may have been the 27th session.

The Court: Well, give counsel the page number.

By Mr. Shapiro:

Q. At any rate, it's on—I'm going to refer to the testimony at page 239 of the transcript of May 26-May 27.

Now, at that time, I asked you this question:

"You testified, sir, that if you were required to comply with the collective bargaining agreements, you would be compelled to reduce the service approximately 50%.

"Answer: That's correct.

255 "Question: How do you reach this figure, sir?

"Answer: Well, we have, as I told Mr. Devaney, in the neighborhood of 400 non-operating scope employees working today. Prior to this strike in those classes, not including passenger or LCL freight, in round figures there were a thousand; so that means we would need 600 additional people to comply with the requirements of the various agreements that were in effect prior to October 30.

"Now, that's just about 50%."

Now, was your testimony this morning—

The Court: Well, first of all, as a technical matter, do you recall giving that?

By Mr. Shapiro:

Q. Do you recall? A. Basically, yes.

Q. Would you like to look at the testimony? A. If I might, yes.

Q. Just the portion I read you, sir. (Handing

256 transcript to the witness) A. I was going back a little ways.

Q. I think you can review it with your counsel. I just want you to look at the portion that was read to you, on pages 239 and 240. A. (Returning transcript to counsel)

Q. Now, which testimony is accurate, sir? The testimony that 117 jobs are needed to comply with the collective bargaining agreements or your testimony last May that you needed 600 additional people? A. At that time, that was based on an estimate made to the best of my ability. This testimony today is based on a check with each de-

partment as to their actual needs to bring us into compliance with the agreements.

Q. So that, when you testified last May, you didn't know what their actual needs were? A. That was an estimate.

Q. Did you know what their actual needs were? A. Well, as I explained at the time I gave that, I simply subtracted the number of employees we had then from the total we had prior to the strike.

Q. Now—

The Court: I have just one suggestion, Mr.
257 Shapiro. 122 is what I got to be the additional number to be in full compliance. That's the difference—

Mr. Shapiro: I think, in the light of the adjustments that have been made in the testimony, I think that is right.

The Court: Yes, 122. It would have been the difference between 390 and 525, but there were 13 additional put on since November 2nd, which would mean the difference between 403 and 525, or 122, rather than 117, which was the figure you gave him. That's the only change I note.

By Mr. Shapiro:

Q. Now, were you present in the Courtroom when the testimony was given about the reasons for reduction of requirements in the Mechanical Department, the Maintenance of Way Department, Communications and Signals Department? A. Yesterday, yes.

Q. And this morning? A. Yes.

Q. And did you hear the description of the labor-saving machines? A. Yes, I did.

258 Q. Now, had some of those machines been operating at the time you testified? A. Well, for example, the "hi-rail" trucks had been operating, but we hadn't had very much experience with them up to the time I testified. And additional equipment was added to those "hi-rail" trucks in order to give us greater efficiency with the man power we had.

Q. But there were labor-saving machines operating at the time you testified, weren't there? A. Yes, there were some.

The Court: Well, the testimony is that all of them were bought in December and all were acquired by January and they were fully tooled up and operating by March, so that they were, all 12 of them were operating in May; isn't that correct?

The Witness: That's correct, yes.

The Court: All right.

By Mr. Shapiro:

Q. Now, that's one category of machines. I take it that there were other labor-saving machines which have been, which were in operation at the time you testified; is
259 that right? A. Yes, we've had labor-saving machines back many months.

Q. So that your statement—well, strike that.

Now, turning to Exhibit II, you have testified in connection with that that you have a screening program followed by a reference to the operating department of the employee who is selected, followed by technical testing, followed by physical examination; is that right? A. Basically, yes.

Q. Now, have your standards for hiring employees changed since the time that the strike began? A. Probably the procedure that they are put through is a little different but the standards are about the same.

Q. Do you recall this testimony that I shall read to you from the transcript of May 26-May 27 in this proceeding on pages 246 and 247? I'm beginning to read at line 23 on page 246:

"All right, prior to the time of the strike, according to Mr. Thornton's testimony, most of your employees had grammar school eduction. Let me refresh you on it, if I may:

260 "'We are now employing only people with high school education with lessons in lab class, whereas before they had grammer school.'

"Now, you were able to run a railroad with the people you had with the grammar school educations; were you not?"

And the answer was:

"Perhaps not as efficiently as it's being operated today."

Now, my question is, in the light of Mr. Thornton's testimony as read to you—you may want to examine this before I go on (handing transcript to the witness), beginning at line 23 on page 246. A. (Witness examining transcript)

Q. Have you increased your standards for hiring employees? A. No. In fact, I think probably in some cases they are a little more lax than they were before.

Q. So that Mr. Thornton's statement was in error? A. No, it wasn't.

Q. But you have it both ways, that is, you have not increased your standards and yet you are only hiring
261 employees with high school educations? A. Well, could I give a full answer?

Prior to the time of the strike, unless an individual had prior railroad experience, it was a requirement that he have a high school education. Today, we can't get employees for the most part with prior railroad experience, so we're still maintaining the requirement of a high school education.

Q. You say that you are maintaining the requirement that they have a high school education, but you are not employing people with high school education because of, because you have relaxed your standards; is that what you're telling me? A. I don't follow your question.

The Court: No, that isn't it. I think you misunderstood him.

What he said is that their requirement before the strike was for people without prior railroad experience that they have at least a high school education; in other words, that the only ones that they took with less than a high school education were ones with prior railroad experience. He says that now they have been unable to attract or employ people with prior railroad experience, so that they
262 are maintaining, as to the new employees, the requirement that they have a high school education since they are people without prior railroad experience.

The Witness: That's correct, Your Honor.

The Court: But that there has been no change, except that now, by reason of the strike conditions or for other unexplained reasons, they can't get railroaders with prior experience to go to work for them.

I have no other comment. I think you misunderstood him.

Mr. Shapiro: I think I did, Your Honor.

I think that's all that I have at this time, Mr. Wyckoff.

Further Cross Examination

By Mr. Milledge:

Q. Mr. Wyckoff, among all your charts here, you haven't included the month-by-month figures of total non-operating employees hired during—on a month-by-month basis; have you? A. Yes, Exhibit II—

263 Q. Excuse me. Let me withdraw the word "hired". In your employment, that is, the total non-operating people in your employment month-by-month? A. No. I don't have that.

Q. Do you have those figures with you? A. No, I do not.

Q. Well, the broad picture that you have given so far, as I take it, is that you are constantly trying to recruit and you have been trying to recruit right along? A. That's correct.

Q. All right. Now, I submit to you the truth of the fact is that, since about last January, you have had approximately 400 people in the non-op capacities and you have maintained a level rate of employment since that time; is that not the case? A. We've had to recruit people to replace ones who have droppd out, and we've had to train those that we have presently in the employ in order to move them up into the positions that have been bulletined, for example.

Q. You recall, of course, Mr. Thornton's testimony, which has been referred to a number of times, before the Defense Board, in October of 1963, to the effect that you had approximately reached your full man-power requirements at that time? You remember the gist of that testimony?

264 A. In general terms, I do, yes. It has been quite awhile ago now.

Q. All right. So that essentially you have had this 400-man non-op force since at least the early part of 1964? A. I won't say we've had 400 but, as I said before, we try to train the ones that we have and obviously the training process is a prolonged one.

Q. You've reached what you considr to be a satisfactory static number of employees at about 400, and you've been holding that; isn't that essentially true? A. We haven't gone too far over the 400 figure, because of the training process, that's true.

Q. Well, you reached it somewhere in the early part of this year, a satisfactory employment rate to the Company, and you have held it since that time? A. Well, actually you're twisting the words, Mr. Milledge. The truth is that the people that we've hired for the most part weren't trained. Now we've had to train them with the supervisory people that we have, and also have the work performed in part by the supervisory people.

Now, obviously you can only train so many at one time and that's what we are engaged in doing now.

Q. What contracts have you been operating—or
265 what working arrangements have you been working under during '64 up to the present time? A. At the present time, we're working under the old contracts to the extent possible.

Q. All right. And you are working your men, up to now, until this Injunction goes into effect, you are working under what? The "Conditions of Employment"? A. Right now we're working, to the extent possible, in conjunction or in connection with the terms of the old contracts.

Now, we have had to have some supervisors perform work, simply because we didn't have sufficient skilled personnel to do it.

Q. Just what are you working under? Just answer the question.

The Court: That's permissible under the contract.

The Witness: No, sir.

The Court: I thought it was.

The Witness: No, sir.

By Mr. Milledge:

266 Q. Well, supervisors can do some types of work? There are some exempt functions? A. Not scope work.

Q. Well, they have—you told us about, for instance, in your office a lot of work is so-called exempt work. A. That's specifically excluded—

Q. All right. A. —in the agreements, in the terms of it.

Q. And you call those people supervisors? A. They are exempt employees, not necessarily supervisors.

Q. But let's go back and—I don't believe we got an answer to the question:

You have been working these people under what working arrangement? It is the "Conditions of Employment"? A. We were working under the "Uniform Working Agreement" and, on November the 13th, we changed all the rates of pay, all the conditions, the working conditions, in con-

formity with the old agreements, with the exceptions that I've enumerated—having supervisory personnel do the work in some instances, crossing of craft lines in some instances.

Q. On November 13th of this year, you mean?
267 A. That's right.

Q. And this "Uniform Working Agreement" is essentially the same thing for the non-ops as the "Conditions of Employment"? A. Essentially, yes.

Q. Yes. So, up to November 13th, you've been manning the working arrangements, you've been manning the uniform working agreement or "Conditions of Employment"? A. Uniform working agreement, yes.

Q. All right. And the rate—the number of people in your employ has remaind, in the non-ops categories has remained essentially static since the early part of 1964? A. Attributable to—

Q. Well— A. —the training procedure, yes.

Q. Just—you haven't furnished us any month-by-month data, just so the record is clear, the approximate gross number of non-ops, people in non-ops capacities has remained essentially the same since the early part of 1964? A. I yould say that's essentially a correct statement.

Q. Right. So that your testimony, back here in May, that you had approximately 400 non-operating scope employees in the non-operating categories is, you say
268 essentially true? A. That's right.

Q. Now, in this Exhibit II, this column, the last column, "Failed to Report", should actually be between "Selected" and "Hired"? In other words, it's not a deduction from "Hired"? A. That's right.

Q. And the way you've got it set up, it might appear that "Failed to Report" was an additional deduction from "Hired", and that's not the case? A. They are in addition to the "Hired". They didn't actually show up on the payroll.

Q. Does "Hired" include "Failed to Report" or not? A. No.

Q. Now, let's go back to this on BB, Exhibit BB: You've got your columns—Column 6 is the one, your jobs that were bulletined, 114 jobs. How many of those bulletined jobs did you fill? A. You mean with people presently in the service?

Q. How many of the bulletined did you receive bids on and award jobs? A. Well, I received bids from three of the striking employees—

Q. Just— A. —and from—sir?

269 Q. Go ahead. A. And from several of the employees in the service; just how many from employees in the service, I don't have those figures with me.

Q. Well, essentially all of them; isn't that true? A. No. Oh, by no means.

Q. Well, how many did you fill? You filled a substantial number of those jobs? A. No, not a substantial number by any means. We filled some of them from employees presently in the service who were qualified to take the jobs.

Q. Well now, you have 52, according to Mr. Hales and this chart—is that his name? Hales? A. That's right.

Q. Mr. Hales. You had 52, you bulletined 52 jobs in your Mechanical Department? A. That's right.

Q. How many of those have you awarded? A. As I say, I don't have the figures with me but it was by no means 52.

Q. Did you not award those 52 jobs to the 52 apprentices? A. No, we didn't.

270 Q. And you don't intend to do that? A. Not until they are trained to take the jobs, no. We're not going to award jobs to someone who is not qualified to take the jobs.

Q. Now, does this—do these totals here include trainees? A. Which totals do you have reference to?

Q. Any of them on BB? A. You mean the people presently working in these various classes?

Q. Yes. A. Yes, they include trainees.

Q. In other words, this 390 figure includes trainees? A. That's right.

Q. And the way you work a man as a trainee for a period of time and then he becomes an apprentice, let's say, in Motive Power, and then he becomes—then he is awarded a journeyman's job? A. No. We put him in the apprentice training program, based on his qualifications, the prior qualifications. The apprentice training program in the shop crafts, for example, is four years.

Q. Well, just so we don't have a confusion in terms, is an apprentice the same thing as a trainee? A. Yes.

271 Q. You don't have separate categories of trainees? They are all— A. Not in the shop crafts, no; they are apprentices.

Q. Now, you have awarded jobs, journeymen's jobs, to apprentices, have you not? A. To some who had acquired sufficient skills to assume the jobs, a job that was bulletined, yes.

Q. Do you know how many you have done that with? A. No, as I said, I don't have those records with me.

Q. But you say that's—when a job is bulletined, it's bulletined out of your office? A. That's correct.

Q. And when a bid is made, the bid goes to your office? A. That's right.

Q. And the award is made by your office? A. After checking with the department that's involved, to make sure the individual has the qualifications to assume the job, right.

Q. So that, of these 114 jobs, some have been awarded? A. A few, yes; relatively few.

Q. How many? A. As I say, I don't have those

272 figures but it hasn't been anywhere near 114.

Q. Do you want to give us some kind of an estimate? A. No, because I'm not in position to; but I do know it hasn't been anywhere near that figure.

The Court: Well, wait a minute.

This 13 that you gave us earlier, wouldn't that be the number?

The Witness: No, sir. Those were 13 additional people who have been hired.

The Court: All right. Hired since the jobs were bulletined?

The Witness: That's right, since November 2nd.

Mr. Milledge: But not to fill these jobs.

The Court: Not to fill those jobs; is that what you are saying?

Mr. Milledge: That's right.

The Witness: In some cases, they filled bulletined
273 jobs but not in all cases.

The Court: I understand.

By Mr. Milledge:

Q. Now, the Accounting Department is not your department? A. That's right.

Q. Right. And the Accounting Department presently doesn't have enough people? That's what this indicates? A. That's correct.

Q. So you're not asking the Court to have people in the Accounting Department go out and do some other kind of work? A. We are asking the Court to permit supervisors to continue as they have had to do in the past to perform some of the work while the people were being trained; and also to permit the crossing of—not craft lines, but seniority districts, in the Accounting Department.

Q. Well, you've told us that you are not in detail familiar with the problems of the Accounting Department? A. With the specific duties of each job, that's correct.

Q. You understand that supervisors are doing
274 some of the work there? A. I know that from my personal observation, yes.

Q. And from your charts, it indicates that you don't have enough people there? A. That's correct.

Q. And the way you say you have been getting by is by having supervisors do it? A. Train and assist in the performance of the work; that's right.

Q. Now, there is a department—let's see: You testified about the Personnel Department, and I take it you're not asking for any deviations in the Personnel Department? A. Yes, I have one job bulletin that I've had no bids on, no qualified applicants. And that is being done by supervisory personnel or excepted personnel.

Q. And for how long has that been going on? A. Well, as I said, the job was bulletined on November 2nd. As I tried to explain before, the work load has increased gradually because we are coming into the perishable season now, and it has reached the point where I need an additional job.

Q. What type of person is it in the Personnel Department? A. What type of person?

275 Q. Yes, this job that you don't have filled? A. It works in the timekeeping section primarily, timekeeping and also in crew calling.

Q. What kind of description is that? Job description? What did you say in the bulletin about it? A. Just a minute, I'll read you the bulletin:

"Time Clerk, Bulletin Clerk, Chief Caller." That's the title of the job. Would you like me to read the duties?

Q. Go ahead. A. "The duties of this position consist of verification of time slips of train, yard engine service and station employees under the Rules of the Train Service Agreements, checking against train performance reports, compiling of statistical reports of vacation credits for train, yard, engine service and station employees, assisting in audit of time rolls of other classes of Transportation Department employees and other miscellaneous duties connected with timekeeping and basic payroll account-

276 ing work. Also handling bids from train and yard service employees, maintaining crew boards, advertisements of assignment of vacancies in all departments, calling crews, making reports of train and yard service employees, marked up, cut off, laying off, transferring and reporting for duty from leave of absence, preparing and

distributing bulletins covering job advertisements and assignments for all departments of Railway, and such other duties as may be assigned by the Vice President and Director of Personnel."

Q. This is somebody to work in your office in St. Augustine? A. That's right.

Q. All right. And this is work that has been done by a supervisor? A. It's being done by an excepted person right now.

Q. In your department, you don't have any problems about crossing craft lines. You just want permission to, until you can fill that job, to use an exempt person? A. That's right.

277 Q. And in your department you don't have any problem about apprentice problems, I take it? A. I have a problem getting someone trained for a job, yes, sir.

Q. But you don't have—this person would be under which contract? A. He would be under the Clerks' agreement.

Q. Is there an apprentice ratio provision in the Clerks' agreement? A. No, there is not.

Mr. Milledge: That's all I have.

Redirect Examination

By Mr. Devaney:

Q. Mr. Wyckoff, the question was asked earlier concerning the contracting of work in the Maintenance of Way Department, the bridges.

What is the situation under the agreement with respect to the contracting out of such work? A. Well, you always have a right to contract work where you—

Mr. Shapiro: Objection.

278 The Court: Wait a minute.

The Witness: I'm sorry.

Mr. Shapiro: I don't believe Mr. Wyckoff has testified about contracting out of work on the Maintenance of Way.

The Court: I didn't hear you.

Mr. Shapiro: I don't believe Mr. Wyckoff testified about contracting of work in the Maintenance of Way Department.

The Court: I think it was Mr. Davidson.

Mr. Devaney: That's correct, Your Honor.

Mr. Milledge: There is the further objection that this is an opinion in another field and it is certainly not in redirect of any material covered on cross.

The Court: It's not a matter he testified about on direct or that he was crossed about. Why cover it now,
279 when you had another witness cover it?

Mr. Devaney: Perhaps it would be of assistance if I asked a preliminary question as to his qualifications and familiarity with the agreement, Your Honor; but I believe Mr. Wyckoff is thoroughly familiar with the agreement and as to what the practice is and has been with respect to this work.

The Court: Well, let's go ahead and take it.

The Witness: The Railway has a right to contract out work in any case where it doesn't have sufficient personnel or equipment to perform the work. Now, that's a right that has been upheld by the National Railroad Adjustment Board on countless occasions.

Mr. Milledge: Now, this should be stricken, Your Honor.

The Court: It is stricken. Try to answer the question and not—

By Mr. Devaney:

Q. Again, Mr. Wyckoff, what is the provision of the contract, or what is the situation with the contract it-
280 self; not any interpretation of it, with respect to the contracting out of work in the Maintenance of Way Department? A. There is no, nothing in the agreement specifically with respect to contracting of work.

Q. Now, what has been the practice of the Railroad over the years with respect to contracting out of work? A. Wherever it didn't have sufficient personnel or equpment to perform the work, it was contracted out.

Q. Now, did you say, Mr. Wyckoff, that the other provisions of the old collective bargaining agreements had been placed into effect? A. Yes, they have.

Q. And on what date was this action taken? A. November 13th of this year.

Q. And could you tell us some of the provisions, not detailing all of them but what provisions now are we talking about that have actually been changed in accordance with the old agreements? A. Well, for example, rates of pay have been reestablished that were in effect at the time the strike began; hours of assignment have been established in conformance with the old agreements; to the extent possible, we have maintained craft lines.

281 Q. Now, have the people whose rates were changed in any way been advised of the change in rate? A. Yes. Each one was given individual written notification.

Q. Now, do these represent copies of the notifications, Mr. Wyckoff? (Tendering instrument to the witness) A. Yes, those are the copies I brought with me of the actual notices extended to each individual.

Mr. Devaney: I ask that this be marked for identification as Defendant's Exhibit JJ.

(The referenced material was marked Defendant's Identification Exhibit JJ.)

By Mr. Devaney:

Q. Now, I show you this, Mr. Wyckoff, which has been marked for identification as Defendant's Exhibit JJ.

Again, was a like notice given to each employee in each department where a rate change was involved? A. Yes, it was, a rate change or a change in the hours of assignment.

Mr. Devaney: I move that Defendant's Exhibit JJ be received in evidence. And may I say that the others are here, if anyone would like to look at them. I do not

282 propose to introduce the other individual notices, since they are all essentially the same in nature and

have the individual rates, job descriptions, hours, and so forth, shown on each of them, if counsel for the Plaintiff or Intervenors would care to examine them.

Mr. Shapiro: Do you have any other copies of this instrument or anything like it?

Mr. Devaney: I don't have any more copies. We will make you one if you like.

Mr. Shapiro: I would like it.

Mr. Devaney: The others are there but they are not copies of this one.

Mr. Shapiro: Perhaps a blank form.

Mr. Devaney: I don't have any of those either, but I will make you a copy of this one.

The Court: JJ.

283 Mr. Milledge: No objection.

The Court: JJ is received without objection.

(Thereupon, Defendant's Identification Exhibit JJ was received and filed in evidence.)

By Mr. Devaney:

Q. Mr. Wyckoff, have persons actually been paid the rates under the old agreements since November 13th? A. Yes, the payroll was changed on the 13th to provide the rates of pay set forth in the old agreements.

Q. And the rate was changed; this would have left in the pay period, how many days, Mr. Wyckoff? A. Well, only the 13th, 14th and 15th, as far as calendar days are concerned; for the most part, only actually one working day, since the 13th was on a Friday.

Q. But their rate was changed for that one day; is that correct? A. That's correct.

Q. Have you brought with you a copy of the payroll? A. Yes; I don't have it here on the stand but I have copies there.

Q. Is this the copy of the payroll that you referred
284 to? (Tendering to witness) A. Yes, it is.

Mr. Devaney: Again, I don't intend to introduce this, Your Honor, but it's here if counsel for the United States or the Intervenors would care to examine it.

By Mr. Devaney:

Q. Now, do I understand, Mr. Wyckoff, that pursuant to this change, that these people shown on this payroll were in fact paid at the rate called for under the old agreement? A. That is correct.

Q. And that you have placed into effect all of the provisions of the old agreement as of November 13th, except these provisions that are covered by our Application? A. That is correct.

Mr. Devaney: No further questions, Your Honor.

Mr. Shapiro: I have just one or two, Your Honor.

Recross Examination

By Mr. Shapiro:

Q. Now, Mr. Wyckoff, when you appointed people to the bulletined jobs, as you testified, referring to the 117 bulletined jobs, some of which were filled from your present employees, you did so on the ground that they were
285 technically qualified? A. That's right.

Q. Now, were they qualified under the collective bargaining agreement? A. You mean, did they go through the full four-year training program?

Q. Yes? A. Obviously not, since most of them were hired since the strike began.

Q. So that you are not complying with the provisions of the collective bargaining agreement relating to the assignment of apprentices to journeymen jobs? A. Well, what we had to do was take the individual and slot him into his proper location in the apprentice program based on his prior experience and give him credit for his training in outside fields. We arrived at whether or not he had completed the four-year training program and, on that basis, we made the assignment.

Q. Well now, are you carrying these people as journeymen? A. Yes, we are.

Q. Are you according them seniority as journeymen? A. Yes, we are.

Q. So that, if liberated from the requirements of
286 the apprentice ration and the age restrictions on apprentices, you would not only assign apprentices to journeymen's work but you would give them the seniority and the pay of journeymen; is that right? A. Based on their training, yes; training in outside fields before they came to work for the Railroad and the additional training with the Railroad.

Q. Have you requested—well, you answered Mr. Devaney's question concerning the degree to which you had complied with the collective bargaining agreements by stating that you were complying with that in all respects except those respects listed in the Application for Approval of Employment Practices; is that right? A. That's correct.

Q. So you are familiar with the Application for Approval of Employment Practices? A. Yes, I am.

Q. I show you a copy of the Application. Would you show me where in the Application you request leave to assign apprentices to journeymen positions, according them the pay and seniority of journeymen? A. Pay and seniority of journeymen?

Q. Yes. A. I think we can, under the agreement,
287 we have a right to assign a man as a journeyman when he has completed the apprentice training program.

Q. Would you answer the question, please? A. I thought I had. I thought the agreement afforded us that right, therefore, we didn't have to deviate from the agreement in that respect.

The Court: What you are saying is that carrying them yet as journeymen and giving them seniority as journeymen is no deviation from the contract?

The Witness: As I interpret the contract, yes; as I interpret the contract.

The Court: So that there was no need to include it in the Application for Relief here?

The Witness: That's correct.

By Mr. Shapiro:

Q. Now, what is that provision which you rely on? A. Well, it's the Apprentice Rule, Rule 32 of the agreement.

Q. Which agreement is it you are referring to? A. Shop Craft Agreement.

288 Q. And what is the provision in Rule 32? A. Well, it specifies the requirements for apprenticeship.

The Court: Are you quoting it from memory? You're not reading it, are you?

The Witness: I have it right here, Your Honor.

The Court: Oh, all right. Go ahead and read it then.

The Witness: Paragraph (a) is the age limit requirement, which we ask for deviation.

Paragraph (b) says:

"An apprentice will be required to serve eight (8) periods of one hundred thirty (130), eight (8) hour days of service each, overtime excluded or 8,320 hours."

And as I said before, giving him credit for his service in outside comparable fields, we have slotted them into the proper position in the apprentice training program and upon completion of the additional time with the Railroad, we afford them seniority as a journeyman.

289 By Mr. Shapiro:

Q. So that you are claiming then that, so long as there is—as long as the employee has equivalent apprentice time in prior employment, you can, under the agreement, credit that before you assign him? A. That is the interpretation I place on it, yes.

Q. Now, is this true for other labor organizations? A. Well now, I don't know.

Clerks, for example, don't have any apprentice training program.

Q. It's primarily a matter for the shop crafts? A. Primarily, yes.

Mr. Shapiro: I have nothing further, Your Honor.

Further Recross Examination

By Mr. Milledge:

Q. The use of supervisors to do scope work actually saves you money, does it, Mr. Wyckoff? A. I don't know whether it does or not, really; we need the supervisors to supervise the work. You are not accomplishing the purpose for which a supervisor is there if he's doing the work himself.

Q. Now, under the agreements, if you kept your work force low, this is assuming you had no deviation from
290 it to the point where from time to time there was extra work and you performed it with supervisors, the men presently in the employ would have a claim for time and a half; would they not? In other words, that they had lost their overtime work? A. If they were qualified to perform the work the supervisor performed, I would say yes.

Q. So, if you are permitted to use supervisors, you can avoid any time and a half claims? A. I really don't think the time and a half claims are involved because, as I said before, the supervisors are doing the work that the people are not trained to do themselves, not skilled to do themselves. And certainly an individual who wasn't skilled to do the work wouldn't have any basis for a claim.

Q. Well, there are plenty of people who are skilled to do the work in all of your departments now; are there not? A. Plenty? No.

Q. Well, there are a number of people in each department who are? A. We have some in each department who are skilled, yes.

Q. Yes. And if you are now allowed to use super-
291 visors, any time that you did use a supervisor, that

is, if you are not allowed to do so by the Court, any time you did use a supervisor, you would be subject to a time and a half claim by one of the qualified personnel who didn't get overtime; isn't that true? A. Of course, we are subject to claims for practically anything we do so, as far as being—

The Court: Try to answer the question, please.

The Witness: I'm trying, Your Honor.

The Court: All right.

The Witness: I would say that we possibly could receive claims, but I don't think there would be any basis for them since the individual would already have performed his work and this would be on another job.

By Mr. Milledge:

Q. Just so it's clear:

Before the strike and when you had your full employment, if you used a supervisor to do scope work, you would get a time claim and be obliged to pay a time claim
292 for time and a half; would you not? A. Well, that's right, but the supervisor would then do the work that the individual would have done on overtime—

Q. That's right. A. —on his job.

Q. Right. A. Now, if he's skilled, he's doing the work on his job and the supervisor is performing the work that an unskilled man would perform on another job.

Q. So, by keeping your man power down to 400 and having supervisors do the extra work from time to time, you avoid time and a half payments; do you not? Or time and a half claims? A. Claims possibly, yes; I can't say when we get claims but payments, I would say no because I don't think there would be any basis for the claim.

Q. You say, at the present time, based on the assumption that you don't have enough people—isn't that right? A. Skilled people.

Q. Yes. So, using supervisors does actually result in a savings to you of not paying time and a half? A. Well,

once again, I say that the supervisors are there for a purpose, to supervise the work, and if we are using them
293 to do the work themselves, obviously they are not performing the work that we have them there for in the first place.

Mr. Milledge: I have no further questions.

Mr. Devaney: I have nothing further, Your Honor.

The Court: There's one other matter. I don't know what it has to do with this hearing but, under date of November 17, I received a communication from the President of the United Transport Service Employees, Mr. George P. Sabattie, complaining of notice to the members of that organization covering porters and another notice—one is train porters and No. 7 is—well, I suppose they are the two. I don't know whether there are two separate contracts referred to in the Complaint or—

Mr. Milledge: Yes, sir. I believe Train Porters and Dining Car Attendants.

The Court: Well, maybe that's what it is.

The United Transport Employees are repeated twice in the Complaint.

294 The Witness: Your Honor, they represent—

The Court: One of them being Redcaps and the other being Train Porters. They are separate contracts?

The Witness: That's right.

The Court: In his one Union as to both.

Anyhow, what this gentleman sent this material to me, showing me the Notice that has been sent to "each of our members employed as a Train Porter or Redcap for the Carrier. We are sure you did not intend by your Order of October 30, 1964 to bring such a result."

It goes on to say:

"The Union has not been taking part in the strike. They are not a striking Union. They are people out of work by reason of the strike and the elimination of passenger service."

And the Notices, I'm sure you are familiar with, they are under your signature, Mr. Wyckoff.

295 The Witness: Yes, sir.

The Court: That in order to comply with this Court's October 30 Injunction in this case and comply with the prior agreements, that the Notice was given them that they have lost seniority and their employment relationships with the Railroad are terminated. He goes on to say in his letter hat they are not in position to engage in expensive litigation:

"We appeal to you therefore for help in correcting the situation which is obviously unjust in violation of the spirit of your Order."

Of course, it says that if I have any suggestion of any kind, they will be glad to follow it, and

"We hope you will help us."

Well, it is not my function to act on letters from people. It's not my function to give people legal advice. I simply wrote him, acknowledging his letter and telling him that this matter is coming on for further hearing on this date, and at that time I would bring his communication to the attention of counsel. At that time, I furnished copies of the communication to Mr. Shapiro and to Mr.

296 Milledge. I didn't to you, since I gathered from what he sent me that you have it anyway.

The Witness: Yes, sir. I wrote the letters.

The Court: And I give it to the Clerk. He can put it in the file. I don't know what should be done about it.

As I say, it's not my law suit and I'm not Mr. Sabattie's lawyer or the Union's lawyer. I can't advise him and I'm not trying to tell anybody here what to do, but it seems to be a plea for help and I told him I would bring it to the attention of counsel here. Counsel for he United States particularly may want to take some notice of it.

Mr. Milledge, as representing the Intervenors, they are only the eleven striking non-ops that you represent.

Mr. Milledge: Yes, sir.

The Court: And this is not a striking non-op.

Mr. Milledge: No.

297 The Court: This is one that their jobs were eliminated by the strike and by the failure to perform passenger service.

Mr. Milledge: Yes, sir.

The Court: And this Rule says that, if they haven't worked in twelve months, they are out of a job. And that's what this Notice accomplishes.

Mr. Milledge: I believe one of the eleven of the non-ops Unions is the dining car employees, who received a similar letter, which we will take up in our case.

The Court: You will not?

Mr. Milledge: Will.

The Court: I see.

Mr. Milledge: So whatever is done about that, I presume will be the same as the other two.

298 The Court: Well, suppose we break off at this point, Gentlemen. I've done what I told him I would do. I've brought it to the attention of all counsel at this hearing and I propose to do nothing else about it, other than as activiated or inspired by counsel.

Let's break off until 2:00 o'clock, Gentlemen.

Thereupon, at 1:00 o'clock p.m., on Tuesday, December 1, 1964, Court adjourned to be reconvened at 2:00 o'clock p.m., of the same day.

At 2:00 o'clock p.m., on Tuesday, December 1, 1964, pursuant to adjournment of the preceding session, Court reconvened and the following further proceedings were had:

The Court: All right, sir.

Mr. Devaney: I have prepared, Your Honor, the list which was to be attached o the exhibit that I submitted this morning, Defendant's Exhibit—

The Clerk: GG, I believe.

Mr. Devaney: GG.

Mr. Thornton will be the next witness.

W. L. Thornton.

having been produced and first duly sworn as a witness on behalf of the Defendant, testified as follows:

Direct Examination

By Mr. Devaney:

Q. For the record, will you state your name, please. A. My name is W. L. Thornton.

Q. And what is your position with the Florida East Coast? A. I'm President of the Florida East Coast Railway, St. Augustine, Florida.

Q. Mr. Thornton, I hand you Defendant's Exhibit BB. Would you tell us, please, with regard to the transportation department in general, why the—or what accounts for the reduction of employees there of 67, which is shown in column 7 of that exhibit? A. This is a result of several different conditions, one of which is the LCL traffic that we are not handling to the extent that we did before the strike.

The Court: I thought you weren't handling it at all?

The Witness: We are handling it on a permit basis; also a change in our operation, particularly in our agencies.

300 For example, where we have had clerks before doing, preparing freight bills, these are now prepared by Xerox machines from the waybill, eliminating the necessity of typing out the freight bills.

Likewise, many of the reports that we had formerly made are now handled through IBM punchcards. And many of the reports that were required have been eleminated altogether.

By Mr. Devaney:

Q. Now, in the Transportation Department, Mr. Thornton, an additional 26 jobs were bulletined.

Did you receive any bids from striking employees for those 26 jobs? A. There was one applicant who bid on the

job. However, he later indicated that he would not come in to work.

Q. How is the work being performed at the present time, Mr. Thornton, which would have been performed if you had had the 26 additional people fill the jobs that were bulletined? A. This is being performed by employees in the scope craft, perhaps in a different seniority district or different craft, performing the work that is necessary to be done, but primarily by supervisory people doing the work; and the same process of trying to train the people that we have employed to do the work.

301 Q. Now, if you could only use the 57 scope employees and could not so utilize the people across seniority districts or to use supervisors, Mr. Thornton, would this have any effect on the operation of the Florida East Coast? A. It certainly would.

Q. And what would that effect be? A. Well, it would have an effect of certainly disrupting the operation of the Railroad. It would affect—in fact, in many instances, it will disrupt it to such an extent it will cause cessation of operations.

Q. Could you give us some specific illustration as to how it might— A. Well, for example, dispatching trains, we do not have sufficient dispatchers and this is now being performed by supervisory personnel, and we have no one sufficiently trained to perform that work. And if a sueprvisor was not permitted to do this for certain periods of the day, we would not have a qualified dispatcher to dispatch the trains.

Q. Now, on the LCL freight, Mr. Thornton, you say that you are now handling LCL freight on a permit basis? A. Yes, we are handling it on a permit basis.

Q. And how long have you been handling it on a permit basis? A. Well, I do not know exactly when we

302 started. It's well over a year that we have been handling LCL on a permit basis.

Q. Did you handle LCL freight during 1963 on a permit basis? A. Yes, it certainly was a portion of '63.

Q. Now, are your—is your practice with regard to the handling of LCL freight anymore restrictive than the practice of other railroads in general? A. The trend since the strike has occurred in the industry in general has changed termendously. In fact, we are handling LCL on a permit basis in many instances that will not be handled in other parts, on other railroads. For example, we gave a permit to handle a shipment of—an LCL shipment from our Railroad to a point on the Pennsylvania Railroad and, after it was loaded and was ready to be shipped to Pennsylvania, they advised that they did not receive shipments of less than 10,000 pounds, so it was necessary, despite the fact that we were willing to handle it, the receiving railroad would not handle it, so we are actually handling LCL on a permit basis to a large extent, providing more service than would be provided on other railroads.

Q. Have you taken any steps with regard to the
303 tariff concerning the handling of LCL freight? A. It is our purpose to restore LCL freight and have in order to make ourselves, to provide full freight service and in doing so, we are going to revise our—or have revised our tariff to provide the same LCL service that the Seaboard, which is the other railroad serving this area, provides.

Q. And do you know, do you recall offhand, Mr. Thornton, what limitations, if any, are now imposed by the Seaboard? A. Generally, they provide for the handling of LCL shipments 4,000 pounds, or not less than 4,000 pounds, when loaded or unloaded by the consignee or consignor.

Q. That is the same change that has been made in Florida East Coast's tariff? A. This is correct.

As I pointed out, in other railroads like Pennsylvania, they have set the minimum of 10,000 or 8,000 but we have set it at 4,000, the same as the Seaboard.

Q. Now, Mr. Thornton, in the Freight Traffic Department, could you tell us very briefly what accounts for the reduction of two employees in that Department?

The Court: Which Department?

304 The Witness: Freight Traffic.

The Court: Yes, sir.

The Witness: The reduction there is a result of eliminating reports—or, rather, eliminating the necessity of personnel accumulating this information and converting it into a report. We have changed this and provided this same information through IBM reports.

By Mr. Devaney:

Q. Now, you also bulletined four jobs in the Freight Traffic Department.

Now, who is performing the—well, first of all, did you receive any bids from any of the striking employees for the four jobs that you bulletined? A. We did not.

Q. Now, who is actually performing the work involved in the four jobs covered by those bulletins? A. That is being performed by supervisory personnel to a large extent. Those jobs were primarily rate clerks or quotation clerks, which is a clerk that will look up the rate and quote it for a prospective shipper. This is being done by supervisory people who are able to read tariffs and give this information.

305 Q. Now, if they were not able to so perform, what would be the effect on the operation of the Florida East Coast, Mr. Thornton? A. Well, of course it's necessary, in order to perform the service to the public, to give them rate quotations and to have the necessary information concerning rates for us to carry on the process of our business, and it would greatly detract from the service that the public needs from the Railroad.

Q. Now, have you studied or made any analysis of the over-all operation of the Railroad, particularly if the work which is being performed in the manner that it is now

being performed covering the 114 jobs which were bulletined could no longer be done, as to what the over-all effect on the Railroad would be, Mr. Thornton? A. Yes, sir, I have.

Q. And what would be the over-all effect on the Railroad if it could not operate in the manner that it is now operating with respect to these supervisors and crossing craft lines or seniority districts? A. Well, it would immediately affect the volume of service that we could provide and it would gradually increase, that is, the amount of service that we could not provide. It would actually
306 affect the safety of our present employees. It would affect the safety of the public who are associated joining our Railroad. It would certainly affect the service that the public is receiving from the Railroad. And of course, it would naturally also affect the ability of the Railroad to withstand this strike.

Q. Now, do you have any estimate, Mr. Thornton, as to how much reduction in service this would result in, if not immediately, within this period of time that you have described? A. Well, this is difficult to accurately estimate but, from the over-all picture, I think it would be from 30 to 50%. But you must keep in mind that when you have—it's just like a chain with the weakest link, if we aren't able to have one dispatcher to dispatch trains, that's going to affect the entire operation for that period of time. So it could have the ultimate result of completely shutting down the Railroad.

Q. Now, what is the reason, Mr. Thornton, that based on the complete analysis of the departments we have shown on Exhibit BB, that 114 jobs would be immediately required and you have said that this would result in a reduction of service of 30 to 50%; and earlier the estimated number, based on the number that we had in May as compared with the number we had before the strike, was
307 600. You said that it would reduce the service by about 50%. Can you tell us why you feel that, even

though 114 jobs are needed upon a closer analysis rather than the estimated number given before, it would still result in the 30 to 50% reduction in service? A. Well, these particular jobs that we are talking about are jobs with the higher rate of skills, people with skills that are absolutely necessary for the continued operation of the Railroad.

Mr. Milledge: Excuse me.

I don't know what particular jobs we are talking about.

The Court: The 114?

The Witness: The 114 jobs, that's right; jobs where we need the experience of trained personnel and experience of supervisory personnel for inspection of the trains and the safety of the trains; where we must have skills in accountings and rates and division clerks. These are the skills that we are lacking. And if we are not able to utilize the supervisory people or the people who have these
308 skills possibly in another craft or another seniority district, then the effect on the operation of the Railroad will be the same as the people who they supervise, for example, or who they work in association with.

By Mr. Devaney:

Q. Now, Mr. Thornton, as President of the Florida East Coast, to your personal knowledge, what steps has the Railroad taken since the beginning of operations to secure new employees? A. We have had—the Personnel Department is the one that has the primary responsibility to interview and recruit personnel. Due to the strike, this has fallen over to all of the Departments. Particularly what we have had to do is to go out and—have mechanical people go out and try to locate machinists or electricians that can do their work. Likewise, in the Roadway Department, this was done. The Transportation people did the same thing.

So this has been an effort of all the supervisory people, as far as they can. At the same time, keeping the Railroad operating is their responsibility also, to recruit new personnel. And then, of course, we have gone into a train-

ing program to train these new employees and this has been a continuing effort up until the present time.

Q. Now, has the strike created peculiar conditions
309 under which the Railroad must attempt to operate?

A. It has. It has created—

Q. Could you tell us specifically what you refer to? A. Well, the strike conditions that we have been faced with and which we are attempting to operate the Railroad under are, for example, attempts to have shippers not ship over the Florida East Coast Railroad. We have had—this is not only locally but on a nationwide basis—soliciting aid from Union members throughout the entire United States. It has resulted in secondary boycotts being placed against—

Mr. Milledge: Excuse me.

I object. This has nothing to do with the matter presently before us. It would have, if it did anything, it would reduce the necessity for men but it is not—this talk about secondary boycotts—

The Court: Objection sustained. The answer is stricken.

By Mr. Devaney:

Q. Mr. Thornton, in the actual recruitment of personnel, has the existence of strike conditions on the Florida East Coast imposed a problem in securing the qualified
310 personnel required by the Florida East Coast? A. Yes, in this respect: Whenever we had a series of dynamitings, we've had a corresponding reduction in personnel that made applications for employment.

Whenever we had any attempts, by whoever it might be, to either fire the present employees or in anyway disrupt the continued employment that they may have in the future, this had a very definite effect to discourage the people to come in and apply for work. And this had had an effect upon our ability to get personnel and particularly skilled personnel. Those—

The Court: These Court hearings are bad.

The Witness: I beg your pardon?

The Court: These Court hearings are bad.
The Witness: Yes, sir, that's correct.

By Mr. Devaney:

Q. What has been the result, Mr. Thornton, of your over-all training program? Has it, by and large, been able to supply the number of fully-qualified people as rapidly as you needed them? A. No, sir, it hasn't.
311 We still haven't been able to obtain sufficiently trained personnel. The training program that we have is working toward this end. The supervisory people we have that do have the skills are training those that they are able to train, but there is a limitation on the amount and the number that they can train and also carry on the necessary duties of the Railroad, and we are still limited in this respect.

Q. Now, except for the limitation of your ability with the qualified personnel you have to continue the training program and still perform the work, have you authorized any reduction or withdrawal from the program of training people as repidly as you could? A. No, we have not.

Our efforts are still to continue to train personnel just as rapidly as we can.

Q. Mr. Thornton, in the two departments that I asked you about specifically, namely, the Transportation Department and the Freight Traffic Department, do you know whether any of the bulletined jobs were bid by any of your present employees, that is, people who were already working? A. Of my own knowledge, I don't know.

Q. But if they had, this would not have increased your over-all force in anyway; isn't that correct? A. No. That's correct.
312 Q. And we talked about the 26 jobs which were bulletined.

Do I understand correctly that we are talking about 26 additional employees to perform service? A. This is correct.

And we, of course, as indicated in Column 8, we will need additional trained personnel as the perishable season progresses. And in this respect, we are not keeping up with the demand in the training area.

Q. As of November 2nd, were you at the height of your perishable season? A. No, that is virtually at the very beginning of the perishable season.

Q. And I know you have testified before and I'm not certain whether it was in this proceeding or another. Could you tell us again approximately when you build up to the height of your perishable season? A. The height will come usually around May.

Q. Around May? A. Right after the first of the year, it picks up to a very substantial level and you'll have a plateau until May, and then you'll hit another peak at that time just before the end of the perishable season.

Q. Now, as of today, you are still in the low point
313 of your perishable season; is that correct? A. Yes, it's beginning to build up. I think we got our first car of perishables the last week of October, or right in that vicinity, and it has built up now each day until about Christmas and then we will drop into a little decline between Christmas and the first of the year, and then it builds up to—

The Court: There is usually an embargo?

The Witness: Yes, sir, for your citrus; usually there is an embargo. And your fresh fruits will continue through that period.

The Court: A very large part of your perishables is the citrus, isn't it?

The Witness: Yes, sir, this is correct.

By Mr. Devaney:

Q. Now, in the Transportation Department, Mr. Thornton, is there an apprenticeship program in that Department? A. No, there is not.

Q. And is there one in the Freight Traffic Department-
A. No, sir.

314 The Court: What non-op Union are most of the contracts within the transportation?

The Witness: The majority of them are clerks, and you have the Order, the Telegraphers organization. Then of course, you get into your train dispatchers, yardmasters and, of course, as you get into the passenger area, you are getting into train maids and porters.

The Court: Yes. We are talking about freight now.

The Witness: Yes. That predominantly is—

The Court: Clerks, telegraphers, dispatchers and yardmasters?

The Witness: Yes, sir.

By Mr. Devaney:

Q. In the beginning of the strike, Mr. Thornton, were your employees subjected in any way to any harassment or abuse? A. Yes, sir, the—

315 Mr. Milledge: Objection. I don't think this has anything to do with it. I doubt if that has any bearing on this.

The Court: It may have some remote bearing on this man power business; I don't know.

Mr. Devaney: Your Honor, it has a direct bearing of course on the provision relating to the providing of the seniority lists.

The Court: All right, go ahead.

The objection is overruled.

The Witness: In fact, in the beginning of the strike, almost everyone, new employees and supervisory, were all subjected to harassment of some form or another.

By Mr. Devaney:

Q. Were lists of employees, to your knowledge, circulated? A. Yes, there were.

Q. What were these lists called?

316 The Court: Scab lists, I guess?

The Witness: This is the common name for them, yes, sir. And these were sent out, my particular knowledge particularly is right around St. Augustine and this would give—it even went to the extent of notifying their relatives what business their relatives were in. So apparently this could pass on to not doing business with their relatives. And of course, not only from—

Mr. Milledge: Excuse me.

This is going—this is not responsive to the question. He just asked him what the lists were called and since then—it is not responsive.

By Mr. Devaney:

Q. Mr. Thornton, as a result of this action, did you take any action with regard to the publication of the names of people then working for the Railroad? A. I beg your pardon?

Q. Did you take, as a result of this harassment and the circulation of the names of the people known to be working, did you take any action with regard to the publication or release by the Railroad of the names of people then

317 working for Florida East Coast? A. Well, we attempted to protect these new employees to the fullest extent that we were able by not publicizing their names, so that they would not consequently be subjected to the harassment that was involved.

Q. Did this extend to the seniority lists that had previously been distributed? A. Yes, it did.

Q. Now, in your judgment, does this necessity for protecting the employees with regard to the identification of those who are presently working still exist, the necessity for it? A. Yes, it does. We are continuing to have sabotage even up to the present time.

The Court: Well, the lists don't have anything to do with sabotage.

The Witness: Well—

The Court: I mean, assuming that—

The Witness: I would assume—

318 The Court: —you give them the list, that doesn't have anything to do with sabotage?

The Witness: Yes, sir, it would to this extent. I would assume, if someone is willing to derail a train, they are also willing to cause harassment to these employees that are running the train. This is my thinking, Your Honor.

Mr. Devaney: No further questions, Your Honor.

Cross Examination

By Mr. Shapiro:

Q. Mr. Thornton, who is the head of the Transportation Department? A. The General Superintendent of the Transportation is Mr. Taylor.

Q. Do you supervise the Transportation Department? A. Yes, sir.

Q. Is this a specific supervision or is this a part of your general role as President of the Railroad? A. Well, I would say this: It's part of my general role but also I have a very specific responsibility toward the Transportation Department, as this was my responsibility before I became President, and I still assume these respon-

319 sibilities in addition to the others I have.

Q. What does it mean to carry less than car-load lots on a permit basis? A. Well, if an individual wants to ship—well, let me start off—first, we embargoed the movement of LCL freight. If an individual wishes to handle a movement of LCL, he will call our General Superintendent of Transportation office and ask for a permit to do so and we will, if we are able to, and which we have in all recent instances, grant this permit. This is what it means.

Q. And when did you begin to issue the permits? A. I can't recall exactly. It was back in '63. As to the date, I could not recall.

The Court: I thought the testimony here, starting with these two Government suits in December and again with the Trainmen case about February, I guess, and this case in May, I thought it was all—today is the first time I remember hearing anything about LCL on a permit basis. I though it was not handled.

The Witness: It's not. It has not been a large movement, Your Honor, but, just to give an example, the
320 Government, for example, has asked us to move certain explosives.

The Court: Who?

The Witness: The Government has asked to move certain LCL shipments of explosives into the Cape. They have called us up to do this. This might be a shipment of 500 pounds or 800 pounds, the two that I recall. This would come under an LCL shipment. And we have granted a permit to do that, but we haven't as such removed the embargo against LCL freight.

The Court: Well, I understand what it is. They are offering and, if you want it, you do it is what it amounts to; the shipper—

The Witness: Yes, sir.

The Court: —they make special arrangements.

The Witness: Rather than if we want to, it's whether we can handle it. Our ability to handle it has been the governing question of whether we will or not.

321 By Mr. Shapiro:

Q. Do you recall this testimony in this proceeding last May, Mr. Thornton? I'm about to read from the transcript of May 26 and 27, at pages 291 and 292, and the examination is by Mr. Devaney, beginning at line 21:

"Q. Now, Mr. Thornton, you were asked, or the statement was made by the Court, that you weren't carrying LCL. This is less-than-carload freight?

"A. This is correct."

Now, at that time, you were taking LCL on a permit basis? A. Well, on a permit basis, yes, sir. But our general embargo against LCL still continued. And the fact of actually handling it—in other words, the permit is based on the fact that they will load it and they will unload it at the point of destination, which has this effect: We are not physically handling it with any of our personnel, but it is the LCL rate because it receives the minimum rate you charge for a car-load shipment, for example. We have done this as an accommodation to the shippers and to the people that need this service; we have provided it.

Q. You testified that if you were required to
322 adhere to the collective bargaining agreements, in the light of your inability to get the, I think it's 122 bulletined positions—that figure, of course, represents the corrections on Exhibit BB—that you would have a reduction of service of from 30 to 50%? A. I said this was difficult to estimate but, from a general picture, I would say it would be that and could ultimately mean complete cessation.

Q. That's 30 to 50% of what? A. Of the freight traffic that we are handling.

Q. At the present time? A. Yes, sir.

Q. Can you give us any indication of how much that traffic is in terms of pre-strike level at the same season? A. We are—in car-load lots, keeping it to that basis, we are handling now virtually the same car-loads per week that we were handling this corresponding week in 1962.

Q. I wonder if we could express that—do you recall a figure, a monthly figure, let's say? A. Well, we keep it on a week basis. The last weeks, the two weeks that I can recall, the immediate two past weeks, were in the 4800 category, 48 hundred and some or 48 odd, after that I don't recall the last two digits. This corresponds with 47—
323 4600 cars for the corresponding weeks before the strike.

Q. You are not working any employees on a part-time basis, are you? A. I don't understand what you mean.

Q. Are they working a full day? A. Oh, yes. This is correct.

Q. Now, have you had much overtime in the last month, let's say? A. Well, yes, we have.

Q. Could you tell us—

The Court: You just changed from a six-day week to a five, on the 13th of November; didn't you?

The Witness: Yes, sir, this is correct. I was also—I'll qualify that: I was also thinking in terms of the operating crafts, which are not involved here; but we are, as far as the Transportation Department is concerned, we are also incurring overtime there but we are incurring overtime in the non-operating crafts, too.

Mr. Shapiro: I think that's all I have, Mr. Thornton.

324 Further Cross Examination

By Mr. Milledge:

Q. Mr. Thornton, you told us that, back in the beginning of the strike, you notified Mr.—that is, that you made a decision that seniority rosters were not to be handed out because of harassment? A. I didn't want to have the names of our new employees made public.

Q. And did you notify Mr. Wyckoff of that? A. Yes.

Q. Will you explain then why it is that, in as late as June, 1964, Mr. Wyckoff still says the reason he won't hand them out is because they haven't even been prepared because of a lack of personnel? A. Well—

Q. Did he get the message from you? A. All I instructed Mr. Wyckoff to do was not to give the names out. Now, why he didn't, I suppose he testified to that himself.

Q. But in any event, you say that this idea or instruction is something that happened in the first couple of months of the strike? A. This is right. We immediately were involved in this situation. That's what caused me to

325 protect these individuals.

Q. Now, how many dispatchers do you have, scope dispatchers? A. We have four scope dispatchers.

Q. And how many—did you bulletin any more dispatcher's jobs? A. We did.

Q. How many? A. One additional dispatcher's job.

Q. And so I take it you've got one supervisor working a dispatcher's job? A. This is correct.

Q. All right. Now, I think, when you are telling us about the dreadful things that would happen if you had to apply the contract, you said that the whole Railroad could come to a stop if you didn't have a dispatcher? A. This is correct.

Q. Well, that's what you are using as your example? A. This is one of the examples. I wouldn't say this is the only one, but this is a very excellent example.

Q. Now, you could do the same thing and just work those four dispatchers a little overtime and cover the fifth job?

A. Not according to Federal law. Dispatchers, operators, can only work so many hours under the Federal hours of service law, and we would not be permitted under that law to work those men straight through.

326

Q. Well, let's go back to the beginning:

Suppose a dispatcher's job is for eight hours; correct? A. Yes, sir.

Q. And you've got—and what's your Federal Hours of Service law? A. Well, I can't quote it. I think it's nine hours continuous office and I— don't hold me to that, but I think that is correct.

Q. You say you couldn't comply with four dispatchers to cover five positions? A. I do not believe we could if they could only work nine hours.

Q. Well, do you—is this your department or isn't it? A. Again, I can't quote the law. If we could get the law, I could look at it and give it to you exactly but I can't quote that.

Q. Well, the most you need is one supervisor to handle one dispatcher's job? A. This is correct.

327 Q. Now, what is the size of your supervisory crew at the present time? A. You mean total?

Q. Total. A. When you say "supervisory", now you are including exempt secretaries and the like or just strictly supervisory people? For example, my secretary is an exempt employee but she is not necessarily a supervisor.

Q. Let's talk about supervisors in the sense that you have just talked about them so far, the people you would like to have do scope work. A. Well, I have no accurate figures to be able to tell. I would say somewhere probably in—to break it down, it would be a hundred supervisors who actually did supervision.

Q. And that's substantially more than you had before the strike? A. No, not particularly. We acquired some more to begin with but we, through attrition, have probably moved back to the position we were about the time of the strike.

Q. About the same number of supervisors at the time of the strike? A. I would say so, yes. It may be a little bit less.

The Court: Is this the total number of super-

328 visory personnel, or is this the number doing scope work under these labor contracts?

The Witness: Well, this is—the number was the number of supervisory personnel that we have. Now, I don't think it will be that many that were actually performing scope work.

I didn't understand his question.

The Court: Well, the only thing I want to know is which ones we're talking about.

The Witness: The hundred I was referring to, Your Honor, were—

The Court: In all?

The Witness: —all men who were doing supervisory work.

The Court: You don't know how many of them are actually performing work that's covered by these labor contracts of these non-operating Unions?

The Witness: No, sir, I couldn't say definitely.

By Mr. Milledge:

329 Q. What's the name of the man who is doing the train dispatcher work? A. Mr. Dowling.

Q. Mr. Dowling? A. Yes.

Q. And how long has he been in your employment? A. Well, he was with us before I came with the Railroad in 1960. I don't know how long. He has been with the Railroad for many years.

Q. In that Department? A. Not in that—I think he had been in that Department before the strike began. He was made Assistant Trainmaster; that's his present title. And that was before the strike.

Q. And he works a regular eight-hour shift? A. This is correct.

Q. As a train dispatcher? A. Yes, sir.

Q. Now, in the Transportation Department, outside of the dispatcher situation, you say you have insufficient scope people? A. Yes, sir, this is correct, with the proper skills.

Q. You mean you have enough people but they don't
330 have the right skills? A. Well, we haven't been able to get enough people with the proper skills to do all of the work according to the scope. That's why we bulletined these 26 jobs.

Q. Now, most of those 26, I take it, were clerk's work? A. No, most of them were either accountants, cashiers, rate and division clerks. They were yardmasters, operators, handle train orders, dispatcher. These are all—

Q. In other words, this is a fairly uniform across-the-board thing? In other words, you have, if you had ten men in this category, you'd bid about four or five more, and so forth. A. I don't understand what you mean.

Q. Well, you didn't have—you have a lot of different types of personnel in your Transportation Department, but you have a lack of some of each; is that correct? A. This is right.

Q. It's not all in one—it's not just all clerks you are allowed? A. That's right. It's where we need that particular skill we lack and that occurs in most of the crafts.

Q. And you do have some of each skill? A. Well yes.

For example, the dispatcher, we have—

331 Q. Four out of five? A. We have four out of five.

Q. Now, you are presently working with about 80%, or 75 to 80%, of the scope personnel that you say you need, and you have about—you have 403 and you need 525. That's about 75 to 80%. A. Well—

Q. Is that about right? A. We have 403 and we need 122 additional, whatever that works out to be.

Q. Now, initially— A. I should say this: That some of the ones that we do have are not fully trained as of now; so those, we still would have to use the supervisory people to the extent until they are fully trained or—I want to make it clear on that.

Q. Well, that's— A. In other words, of the 403 that we have, not all of those are fully qualified to do the job that we anticipate that they will do and that we have still got to have a supervisory man with him to actually do the work and show him how it's done and whatever is necessary in the particular instance.

Q. But this situation of approximately 400 employees has been approximately a static work force since the

332 early part of 1964? A. Well, the gross number has been relatively static but the make-up of that has been in constant flux. We've had a tremendous turnover of people in that group.

Q. Well now, you started out in—when was it, Mr. Thornton, that you made the decision to start recruiting on a large-scale basis and attempt to fully man the Railroad?

A. This was in the Spring of '63 when we started to try to get other people to come in. Initially, we did it primarily with the supervisory people that we had there and, in the Spring, was when we began to recruit others.

Q. Well, could you give us the month, approximately, when you started in to that program? A. Generally, I would say about June. This is about the time that the college men got out of college for the Summer. This was the first area of people that we had to come in to work and, of course, this is an example of why it was such flux. These people were only with us for the Summer and went back, and of course this went into your quarterly or trimester situation here in Florida, which affected the turnover that we had of these employees.

Q. So about the first part of June is when you really started a recruitment program? A. I would say
333 that's about right, from my recollection. It may have been, we may have been trying before that, but that was about the first time we got a volume to come in.

Q. All right. And you testified before the Defense Board in October that you had practically reached full manpower requirements; did you not? A. Well, we had enough to provide the service that was being required.

Q. So, when it was a question of getting the Railroad running, you were able in the matter of four or five months to build up a force from practically no scope employees up to your full requirements? A. Well, as I pointed out, this was a force capable of providing the service. We are providing the service today but we are doing so by having our supervisors do the work to a certain extent, to have to cross craft lines; and we are talking about two different things.

Q. We are? A. In other words, I was providing service to the public, and particularly at the Cape, I was providing service to NASA. And I told them that I had—we were approaching the point, I think was the words I used, of having a work force capable of providing service that they needed.

Q. But you maintained the number of personnel,
334 approximately the same, all during this year? In other words, you haven't built it up to where you will man it under the existing contracts? A. This is what we have been trying to do.

For example, as Mr. Davidson testified earlier, we did a great deal of this work with contract maintenance. And as we were able to recruit our own force and work it according to the agreement, then these contract forces were eliminated.

Now, this is—our effort is trying to comply with the agreement.

Q. Why is it then that your work force has remained constant during this year? A. Well, for the one example is—you mean in the Maintenance of Way Department or over the whole—

Q. On the whole line, it has remained constant during this year? A. Well, the thing is that we have been able, early in our recruitment stage, to have the bulk—I'm talking about the labors, the unskilled, or with the minimum skill—these came in. Our difficulty has been in these skilled groups and this takes a greater period of time to train them and the supervisory people that we have have a capacity was to the amount of personnel that they
335 can train. So this is the reason for that.

Q. The real reason, Mr. Thornton, is the reason that you have given in all of your public lectures and written reports, is that you have manned this Railroad under this working agreement, the November 24th agreement, which has how been enjoined and have eliminated, as you say, all of these undesirable practices. Up to now, you have just manned your Railroad under that agreement? A. I don't—I don't—what is your question?

Q. The reason your work force has stayed constant at 400 during the last eight or nine or ten months, whatever it is, is because you have been manning another agreement, an agreement that's no longer in effect. Isn't that the

real reason? A. No. I don't quite understand your question.

The reason has been that the skilled crafts that we lack take time to train and we have had a turnover in this group, and I think, as one of the early exhibits showed, that we have hired a great many people during this time but, as a result of attrition, as a result of people leaving us, as a result of what reasons they may have, we have not been able to accumulate much over the 400. We still need more and we are attempting to get them, but we have not been successful in doing so. This is the deficit that
336 we lack and, if we could make up this difference, we wouldn't have the problem.

Q. You have been training them now since almost a year and a half, since last June? A. Well, the point I was making is that you can train a laborer to drive a spike in a relatively short time, but you do not take a man and train him to be a rate and division clerk or a dispatcher or a yardmaster or an accountant in any comparable period. This is the people that we lack.

Q. Well now, for instance, in your Maintenance of Way Department, you've got all your—you're not lacking six bridge foremen; you are lacking six men, one bridge foreman, one assistant bridge foreman and five laborers; isn't that right?

The Court: Roadway—

The Witness: One roadway foreman.

The Court: Or one track foreman, whatever it is.

Mr. Milledge: Right. So one complete group?

The Court: Four laborers and two foremen.
337 Mr. Milledge: Yes, sir.

The Witness: Well, what happens there is the experience in the craft of the foremen.

In other words, what we propose to do is to establish two more gangs, a bridge gang and another roadway gang. Now, we've had enough laborers in some other gang that we could make up the balance of that force, but we haven't got

a supervisor or foreman that we can trust to go out and work on the track who has enough ability to know what to do and do it safely.

This is why we've got to have a supervisor with them to do it.

And the same situation exists in your Bridge Department. We can't, we do not have the foremen and, in that particular case, we do not have the bridgemen, which require a skill above that of a section laborer. And that's why that work is being contracted out.

By Mr. Milledge:

Q. What you actually have is, in across the board, you have about 80% in all you skills, whether it be in
338 track laborers or whether it be foremen, you run approximately 80% in all skills? A. I couldn't say that necessarily; I mean, I couldn't—

Q. You have four out of five dispatchers. You have all but one gang. It isn't that your Maintenance of Way situation is bottom-heavy. It's uniformly depleted by one gang? A. No. Our problem is that it's bottom-heavy. We do not have the foremen trained and it takes time to train them. This is what we are saying.

Q. I suggest that's not what has been shown heretoday. You are lacking six men in your Maintenance of Way, but it's not six foremen you're lacking; you're lacking two foremen and four laborers. A. Well—

Q. It's a uniform loss. A. Well, I'm afraid you don't understand what I've said.

The foreman—in other words, we can get— Take the track foreman. We can get sufficient laborers to make a gang if we had the foreman.

Q. All right. A. So I could say we could bulletin more jobs as laborers, but we have laborers in some of
339 these other gangs that we've been trying to train and we are a little bottom-heavy by having them there, but we need them there to train them but we haven't been able to train the foremen sufficiently.

Q. According to your testimony, you are only lacking two foremen in your Maintenance of Way Department? A. This is right.

Q. All right.

The Court: The testimony is you have one other bridge gang and you have eight other road gangs at this time.

The Witness: Yes, sir. See, the bridge work that we—the bridge gang that we bulletined, we have presently being performed by a contractor.

The Court: The foreman and four men, is that about a porper size for a bridge gang, or is it one a little larger than that?

The Witness: It depends on the equipment they would have in their job. We try to break down—our plans are to have two bridge gangs, one for maintenance and
340 one for heavy repairs. Now, your maintenance gang, a four man gang, is about right. To go into pile-driving, you may need a few more than that, where you are handling pile-drivers and cranes and the like.

By Mr. Milledge:

Q. Well now, back to your estimate of the consequences to the Railroad if you are obliged to operate under the contracts.

Back in May when your estimate was needed—you had about half enough employees in the non-ops crafts, the estimate was that if you had to operate, you would have a reduction of about 50% in your operations. But now the figures indicate that you've got approximately 75 to 80% of sufficient personnel without using supervisors, but you tell us this might close the Railroad down completely? A. It could, yes sir.

Q. Well, tell us how that could happen? A. Well, for example, go back to your dispatcher. If we couldn't operate trains because we didn't, we couldn't get a supervisor to do that work, it's certainly not safe to operate the train without any train orders or provisions to meet other trains. In fact—

341 Q. Well, you've got four out of five of them. A. Well, what are you going to do for the other eight hours of day?

Q. Well, explain that. A. In other words, five—it takes five dispatchers to work the regular tricks.

Q. All right. A. So, during 40 hours a week, you couldn't run a train. This is what I'm saying.

Q. All right.

Assuming that it does take five dispatchers to operate a railroad, is there any other example in which the lack of a man is going to stop the whole system? A. Well, I think it would have the ultimate result. Take, for example, your mechanical department. We've got to have car inspectors. Now, this is a man that's got to be able to inspect the car and determine if that car is safe down—safe to operate down the Railroad. Now, this is a skill.

Now, I can't take an unskilled man and have him go out and look at that car and have him, for the safety of that train crew, for the safety of the public involved,—

Q. How many car inspectors do you have? A. I couldn't precisely say but these were some of the positions
342 that were advertised, I recall from Mr. Hales' testimony here, for car inspectors.

Q. Well, car inspector is simply mechanical; I mean, it's mechanical training, right? A. Well, he has got to have the experience in being able to detect a flaw. This is a skill and it takes experience and it takes time.

Q. Well, are you saying that your car inspectors are primarily supervisors now? A. We certainly have to have our supervisors do some of this work and to go with the trains that are on the job; and this is the way we are attempting to train them, is on-the-job training, and at the same time we've got to see that the job is done safely. Certainly we cannot operate a train, in fact it would be against the law to operate a train, without it being properly inspected.

Q. And you say no trains are inspected without a supervisor being there? A. I don't know if no trains are inspected. I know most all of the trains are being inspected with the supervisor being present. Now, I couldn't make the statement that no trains are being inspected, but we have some returnees. We have probably some that are approaching the point where they will be able to do
343 it, but we are still lacking in this craft very specifically.

Q. But you don't have any figure? A. Not the number, no, sir. If I remember correctly, however, I think it's in the record what Mr. Hales testified to.

Q. Did he testify on the car inspectors? A. I'm pretty sure he did. I think he went through—now I'm mistaken. It was Mr. Wyckoff who went through each bulletin but I recall Mr. Hales testifying that he did have to have car inspectors and they were part of those who were bulletined.

Another area was in your Signal Department. We have the maintainers but, in many areas, they do not have the sufficient skills to maintain some of the signal appliances. To tune in your relays at your crossing protection and your code on your CTC; now, this takes a special skill and these people, in many instances, have not these skills and it's necessary that the supervisor do this. And again, these are requirements of the Federal law insofar as your signal appliances are concerned and insofar as your car and safety appliance act is concerned.

Q. And do you recall your signal man Webb testified you haven't added a single man in that Department since
344 April? A. I think the testimony is that the people that he advertised, some seven jobs, this was for the construction of CTC.

Now, we have most of the maintainers that we are going to have, but they are not sufficiently trained to do this work without the supervisors assisting them and showing them how to do some of it.

Q. I think you have—in other words, you say you've got enough people to do the thing but they are just not trained? A. In some cases, this is right.

For example, the eleven maintainers, we did not advertise any maintainers that I recall. We have sufficient signal maintainers but they aren't sufficiently trained.

Now, we do not have sufficient signalmen and foremen for the signal gang to insall CTC. You recall that was Mr. Hales' testimony—Mr. Webb's testimony.

Q. You mean all these seven jobs are just all CTC jobs? A. Well, I think that some of them that also were involved in the signal shop but, other than the signal shop, the CTC construction, that was the purpose for them.

Q. But you say that you are actually trying to increase the size of your work force but just haven't been
345 able to increase the size of it this year? A. Well, we have bulletined 122 jobs. Now, we need to increase it to that extent.

Now, I will admit also, as this evidence shows, that we are—

Q. Well, excuse me. Did your ideas change then on November 5th, or whatever it was, when you bulletined these new jobs? A. I don't understand the question.

Q. In other words, did your purpose, your man-power requirements change on that date? A. No, but we had as many men—well, not as many.

Q. Well— A. We had about as many men as we could train.

Now, we couldn't bring in 114 unskilled people and train them at this time. We haven't got the capability of doing this. Now, if we had 114 or 122 skilled people come in, then we could do it. But we are talking about an entirely different thing of bringing unskilled and a skilled man in.

Q. Well, you brought 400 in, or more, in a six-months' period. Now, you say you can't bring 100 more in now? A. Well, these were men that needed very little training.

These were the unskilled or small skilled employees.
346 I think I've already testified to that effect.

Q. Now, that isn't the way it sounds from the testimony.

The testimony sounds like you've got the same ratio of foremen to the total number of foremen as you do have laborers to the total number of laborers, as illustrated by—as by the Signal Department. A. I don't follow you at all on that.

Q. Well, of course this actually does come down to one question. It does come down to a question of money; that you could take your crews that you presently have and work them on overtime, time and a half, and get these various jobs done, and work under the contracts? A. I don't follow what you mean.

Q. Well, you've got—just as a for instance, in your Motive Power Department, you've got 136. And you say you need 199. Well, you've got 141 now. You just work some of those men time and a half and pay them time and a half? A. Well, they don't—

Q. And get the job done? A. —have the skills to do the work.

Q. They have the skills to do it eight hours a day,
347 don't they? A. No. That's what we've been pointing out to you. They don't have the skills in many instances to do this, and this is why we have to have supervisory people assist them in that, because they don't have the skills.

Q. So it wouldn't do any good to work them time and a half then? I mean, overtime? A. If they can't do the work without supervision being there, the supervision has still got to be there to do it.

Q. Well, are the supervisors doing the work or are these 136 men doing the work? A. A little of both. Now, we've got supervisors having to do some of this work, just like I explained with the dispatcher. He's working a full

trick because we don't have anyone else to do it that's capable and trained to do it.

Now, in most cases, we've got a supervisor working with the man and training him to do it. And he's also having to supervise the general operation. But there are instances where our supervisors are having to do the work.

Q. Well, there are instances—I mean—you mean like Mr. Wyckoff's clerk in his office and like the one dispatcher, are those the instances you are talking about? A. Yes, they are—

348 Q. In other words, there are a few specific instances where you have got to have a supervisor actually working in a scope position because of critical importance? A. Yes, full time. But now, there are many instances where the supervisor has got to work with a man along with the work and actually do some of the work in showing him how it's done.

Take, for example, your car inspection.

The Court: Your what, Mr. Thornton?

The Witness: Car inspection.

We've got the General Foreman going with the car inspector to inspect the train. Well now, to a large extent, that car, the General Foreman is making the inspection of the car because he knows what to look for. And if he sees something, he know what he sees. At the same time, he can point out to his car inspector that, "This is a defect. This is what might cause a wreck. This would have to be cut out. The brakes aren't properly adjusted, or air brakes out of date." This is the way he instructs the man. But at the same time, he is in effect doing the work.

By Mr. Milledge:

349 Q. So— A. And this is many examples.

Q. Most of your staff, you say, are still untrained and can't work by themselves; now, is that the gist of it? A. There are a great many of them, yes.

I think Mr. Hales' testimony was that out of the 136, 52 of them were—

Q. Apprentices? A. —apprentices. So this is very indicative of this situation.

Q. So that would indicate— A. It's better than a third of his force who are apprentices. And even the journeymen are not, in many specific skills, are not able to do it.

Q. All right. I had sort of misread a lot of your correspondence, a lot of your writings, in which you told about what a fine staff you had and it was much better than the former employees. And I take it your testimony is that that's not true, that they are people that require— A. I think the talk—you are talking of some talks I made or articles; the point I was making in these was that the featherbedding of the railroad industry is tremendous, that we were able to do with the force that we had, supervisory force and those that we were training, a much more efficient job in some instances than we were doing
350 prior to the strike. Now, this—

The Court: These labor contracts—

The Witness: That's right. And this is the point I was trying to make, is that the labor contracts are featherbeds. This is the point I was making. I didn't want to mislead you at all on that.

By Mr. Milledge

Q. All right, that's where we are back to.

What you want to do is use supervisors, just like you have been using them, right on, so that you can violate the contracts ad infinitum. A. No, that's not correct.

Q. That's where we are back to, isn't it? A. No, that's not correct at all. That was your statement, not mine.

Mr. Milledge: That's all I have.

The Court: Mr. Devaney?

Mr. Devaney: Your Honor, I have no redirect on this, except the one point that we have not yet covered,
351 and this was bridge tending.

The Court: This was what?

Mr. Devaney: The bridge tending.

The Court: Yes, sir.

Mr. Devaney: That was Point No. 6 in the Application. Mr. Shapiro had indicated this morning that he agreed that there was no objection to continuing to perform this.

Mr. Milledge said that he didn't agree as to Item No. 6, although he did as to Item No. 3.

I have deferred it until this time and, if Mr. Milledge wishes to reserve his objection, I would like at this time to develop this point by technically recalling Mr. Thornton with respect to this one item that has not been dealt with yet.

The Court: You haven't changed your view since yesterday, have you?

Mr. Milledge: I still don't understand what the problem is.

352 The Court: All right, you may go ahead and proceed.

Further Direct Examination

By Mr. Devaney:

Q. Mr. Thornton, will you tell us what bridge tending involves? A. Well, this involves the operation of draw bridges, raising them and lowering them, greasing them, for the passage of—the greasing is a part of the maintenance element, which is done in some instances. However, to a large extent, this is done by bridge forces but the actual bridge tending is done by—is actually raising and lowering the bridge to permit boats to pass.

Q. And prior to the strike, who actually performed this work of lowering the bridge or opening the span? A. This was performed by a group called the bridge tenders, which comes under the Maintenance of Way agreement.

Q. Now, what was the situation after the strike began? A. Well, this was performed by supervisory personnel.

Q. Now, did this continue to be performed by supervisory personnel? A. Well, we have supplemented that

in some instances by security personnel. Now, I
353 speak of this—there are companies that provide guards for this, any industrial security, and we have called on these people to help with the security of these locations.

Q. Now, do the supervisors, Mr. Thornton, as well as these security guards, perform the function of a guard in addition to their normal bridge tending duties? A. This is correct.

Q. And why has this been necessary? A. Well, the bridges, the draw bridges as well as other specific bridges, are critical points that would cause us considerable damage, in fact, put the Railroad out of operation, if they were mishandled or if they were sabotaged, and we have—in fact, much of the sabotage has been directed toward bridges, dynamiting bridges, and so forth, or tampering with the track on bridges. And for this reason, it has been necessary that we use either supervisory people or bonded security guards for this work.

Q. Do I understand that the job they are now performing is not entirely the same as what was required of these bridge tenders before the strike? A. No. Their primary duty is that of security.

Mr. Devaney: No further questions, Your Honor.
354 Mr. Shaprio: I believe the Government has waived objection in this area.

Further Cross Examination

My Mr. Milledge:

Q. Why can't you have bridge tenders, like you are supposed to have under the contract? You can hire people to tend a bridge, can't you? A. Because they are so critical. This is the kind of thing that you can't make but one mistake on and, for this reason, we cannot afford to use anyone other than supervisory personnel or a security guard.

Q. No, I'm not asking you about the man who holds the gun or walk around, whatever security you want to

have, high rails or whatever security you want. I'm sure you want to have that by supervisory. But there is a job called opening and closing the bridge, which is a job under the contract. Why can't those people be hired? A. Well, for example, some of the people that have come in and attempted to hire out with us have been people who have been trying to do so to come in and sabotage the Railroad.

Now, we have to guard against this very specifically. And this would be an area where these people would try to do that and we couldn't afford to take the chance because—

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Q. That would be the same thing for engineers. I mean, these engineers have been on strike and anyone of them could tear your equipment all to pieces at any time, if he had a criminal intent. Isn't that right? A. This is the reason we have to be so extremely careful. But when you come into an area of a draw bridge, for example the draw bridge right here at Jacksonville, if it is out of operation, we can't get a car on the Railroad, the Railroad is completely isolated. And it's for this reason it is of such paramount importance that we cannot afford for the security of the Railroad, for the continued operation of the Railroad, to permit someone that we haven't full security or bonded security guard or a supervisory person to perform.

Q. Now, Im not talking about the security aspect of the bridge. I'm just talking about the man who opens and closes it. A. That's what I'm talking about also.

The Court: You have your supervisors do that, as I understand it, either a supervisor or a bonded guard?

The Witness: Yes, sir.

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The Court: Actually operate the mechanism; is that what you are saying?

The Witness: What we are saying, Your Honor, is that—

The Court: You do away with the regular bridge tender and have a bridge, kind of a combination guard and detective and bridge tender?

The Witness: Well, it happens that way; but the point I was making was that we cannot permit the future of the Railroad to be placed in the hands of a man that might drop the birdge too hard and say, "Well, I'm sorry, I just made a mistake." But you broke the bridge. And this puts us out of business.

I think this is the matter that is of such major importance that we cannot afford to let anyone handle the bridge, raise it or lower it, that could accidentally or any other way put it out of operation.

The Court: If you find a qualified person, that's no greater, no more cirtical or less critical than this other position.

357 The Witness: If I could be absolutely sure, sir, that he wasn't going to, after he became qualified, so to speak, then mishandle the bridge and put us out of business.

For example, Your Honor, in the Federal case involving the sabotage on this Railroad, it was brought out by the witness in that case that what they suggested was for the man to come in and hire out on the FEC and then do sabotage within the Railroad itself. And this, we've got to guard against at all times. And this is an area that is particularly subject to this type of interior sabotage that we cannot permit.

By Mr. Milledge:

Q. You couldn't have a bridge tender in addition to the guard? I mean, you think you need to have a guard there? A. Well—

Q. With a gun and whatever else he has? All these people are armed, I take it? A. I assume they have it available; if they don't—

Q. I mean, he could guard the bridge tender too, couldn't he? A. But if the bridge tender drops the bridge too fast and he could very innocently say, "I'm sorry, I made a mistake"; but that's not going to prevent the Railroad

from being out of operation. And under the strike
358 conditions that we've been operating under, under the known conditions that we have people trying to hire out who are doing so to sabotage the Railroad, I think that we would be reasonably expected to place the future of the Railroad operations under those circumstances.

Q. You've never had any interior sabotage during this whole strike, have you? Have you had any person that you hired that caused some damage from the inside? A. With the exception that the four men were convicted, we don't know who performed the sabotage. We do know that four men were convicted. They were all Union members but—in fact, one of them was a Union Officer.

Q. You don't have that problem now; you're not hiring Union people? A. Yes, we are. They are coming back to work, but I'm not—that's not the problem that we are faced with here.

Q. Well— A. We are talking about hiring anybody.

Q. If you have such a problem, the same problem is a uniform problem that, if your shops are destroyed, somebody goes in there and blows up your shops, you can't operate? A. It's a matter of relative—you can blow up a shop, this doesn't shut the Railroad down, but if you mishandle a draw bridge—we're talking about a period
359 of—

Q. You repair the draw bridge? A. Not in a period, in any reasonable period. We had to build a bridge to the Cape, for example. That took us about a year. We had to order the steel, the steel had to be rolled; in fact, we—

Q. So if a bridge tender drops a bridge too hard, that's going to take you a year to replace the bridge? A. It could. This is the situation that we are faced with and this is why we—

Q. But the reason—let's just get back—the reason you don't want bridge tenders out there and manned under the contract is because he might push the lever too hard?

You can't reasonably be afraid that the bridge tender is going to blow up his own bridge because you're going to have a security guard next to him? A. Well—

The Court: Because he is on it, too, I guess.

Mr. Milledge: Of course, that's another reason.

The Witness: He can do the same damage by just dropping the bridge too hard and bending it. This is very—

this is exactly what I'm talking about and, as you
360 may know or may not know, we have security guards on both ends of the bridge. It isn't a matter of cost. We are spending over a thousand dollars a day to provide security to prevent sabotage. Now, this is extra cost that we are put to on account of strike conditions that we aren't talking about—we could be eliminating this cost; eliminate the sabotage and the vandalism, the savings to us would be tremendous, but we can't afford to do that. It's not a matter of cost to us at all. It's a matter of security.

By Mr. Milledge:

Q. And you say that the only reason you say that you don't want to have bridge tenders is because they will let it down too hard? A. This, we are afraid of and we cannot take that chance.

The Court: Are you through?

Mr. Devaney: I'm through, Your Honor; we have no further questions of the witness.

The Court: Do you have any further—

361 Mr. Milledge: No, sir, of this witness; I think we ought to go into that other question.

The Court: I didn't hear you.

Mr. Milledge: I didn't mean to say we did not have some other testimony.

The Court: Oh, no. I mean with the witness.

You may come down, Mr. Thornton.

(Witness excused)

362 Mr. Devaney: That's all we have at this point. We rest, Your Honor.

The Court: This is all the evidence you present?

Mr. Devaney: That's correct.

The Court: It may be a good time to break off for a few minutes, before you Gentlemen start.

Will you have evidence?

Mr. Shapiro: I would like to recall Mr. Wyckoff for a few questions, Your Honor. I cannot say that it is—

Mr. Milledge: I don't think ours—

The Court: All right. We'll take that. Then you—in other words, that will be all that the United States would have and you would be prepared to go ahead with yours right away?

Mr. Milledge: Yes, sir.

363 The Court: All right. Suppose we break now.

(Short recess)

The Court: You may proceed.

Mr. Shapiro: Call Mr. Wyckoff.

Raymond W. Wyckoff,

having previously been sworn as a witness on behalf of the Defendant, was recalled as a witness on behalf of the Government and testified as follows:

Direct Examination

By Mr. Shapiro:

Q. Mr. Wyckoff, you understand you are still under oath? A. Yes, I do.

Q. Mr. Wyckoff, you have testified that the Railroad is in full compliance with the collective ba gaining agreements, except in the respects listed in the Application which the Court is now considering, and you have also testified that you are appointing people to journeyman positions from the apprentice classes; is that right? A. That's correct.

Q. Now, are your apprentices indentured apprentices under the collective bargaining agreement for the

364 shop crafts? A. I don't follow your meaning. Are you referring to Rule 31 of the agreement?

Q. I believe that is the Rule. Perhaps we ought to bring out of the record the agreement for the shop crafts. Now, I think it is contained in Exhibit 4, which was introduced last May, and it is somewhere in this envelope. I don't recognize it on sight; do you think you could? A. I have a copy of the agreement here.

Q. Shall we use that? A. It's all right with me.

Q. On the understanding that I believe this is already in evidence, from the previous proceeding.

The Court: It's already in evidence. There is no question about that, is there?

By Mr. Shapiro:

Q. I'm afraid you'll have to share your copy, Mr. Wyckoff. A. (Witness tendering instrument to Mr. Shapiro) It's Rule 31, I believe.

Q. Now, what are the requirements of Rule 31? You needn't read it. A. It simply says:

365 "All apprentices must be indentured and shall be furnished with a duplicate of indenture by the Railway."

That's a matter that's handled by the Mechanical Department and always has been. I assume it's being done.

Q. Is there some particular form of indenture? A. I believe it's a printed form. There again, as I say, it has been handled by the Mechanical Department over the past years.

Q. Is this form of indenture on page 38 of the agreement the form which would be used? A. It's a form here. As I say, I think it has been printed off, the printed form which is used by the Mechanical Department.

Q. But that is the form that's contained in the agreement and would necessarily be the form you would have to use under the agreement? A. That's right.

Q. And all your apprentices now have these Articles of Indenture? A. As I say, that's a matter handled by the Mechanical Department. I assume they have.

Q. But you don't know? A. That's correct.

366 The Court: Has Mr. Hales gone?

The Witness: Yes, he has.

By Mr. Shapiro:

Q. Now, you testified this morning that apprentices would be assigned to journeymen positions and given their seniority and pay, and so on, when they became eligible under the agreement; is that right? A. I believe I said they were slotted into the appropriate standing as apprentices, based on their prior experience in outside industries in that particular trade, and then given a credit—

The Court: And didn't you also say that when they were promoted to journeymen that they got the appropriate pay raise and went on the seniority roster?

The Witness: That's true, Your Honor, yes.

The Court: I thought you said that.

By Mr. Shapiro:

Q. Now, if an apprentice has to be indentured, how can you credit his outside service? A. By deter-

367 mining what his prior service was.

Q. Under the agreement, what is it that permits you to refer to his outside service? A. I don't think there's anything in the agreement that prohibits you from referring to his outside service. Unless the agreement restricts you in some way, the management has the prerogative of doing it.

Q. Now, is there any provision in your agreement for temporary employees? A. No, no provision for temporary employees that I know of.

Q. Would it help you to re-examine page 87 and page 88 of the agreement? A. Well, that's a Memorandum Agree-

ment covering non-qualified employees. That was negotiated during World War II.

Q. Is it still in effect? A. Yes, it is.

Q. And what does it provide? A. Well, it simply provides that the Railway will continue their efforts to secure qualified men of four years railroad experience, as required by the Rules. And of course, we're doing that. We're trying to get railroad men with four years experience. We haven't been successful.

368 Q. If you can't get men with the— A. It says:

"In the event needed personnel cannot be recruited as outlined above, the following shall govern:

"(a) That necessary personnel will be recruited by the Supervisors in charge and local committees of the respective crafts."

Now, I don't know of any that have been recruited for us by the committees.

Q. I understand; go on.

A. "In such recruiting, during the present emergency and by Agreement between the Supervisors in charge and the Local Committees, men may be employed even though their qualifications may not be in strict accordance with the qualification rules of the respecitve crafts, as covered by the current agreement; it being understood that each application of such non-qualified person will be subject
369 to acceptance by Supervisors in charge and Local Committee in each case."

Shall I continue reading?

Q. Please.

A. "When employees enter the service under paragraph (b), they shall be considered Temporary Employees, serving only until such time as the present emergency is over,

or until such time as duly qualified men with four years railroad experience make application for employment.

"When duly qualified men having four years railroad experience make application for employment in the respective crafts or seniority sub-divisions thereof, sufficient temporary employees will be released to make room for them. Temporary employees released under these conditions will be given not less than three (3) working days' notice before release becomes effective. When it becomes necessary to release temporary employees as pro-
370 vided for in paragraph (d), the Local Committee and Supervisor in charge shall consider all temporary employees in the craft affected and shall agree on which temporary employees are to be released (taking into consideration previous experience and ability to do the work). If the Local Committee and Supervisor in charge cannot agree, the matter shall be referred to the Superintendent Motive Power and Machinery and the General Chairman of the craft affected to make decision. In the event they fail to agree, employees will be released in reverse of order in which they were hired."

Q. Well, in the light, in view of the fact that the contract restricts the assignment of apprentices to journemen positions and instead would require the appointment of temporary employees during the non-strike period, you state that the Railroad nevertheless has the right to appoint apprentices to journeymen positions, based on its own judgment as to their prior experience? A. I say yes; that agreement entails certain considerations on the
371 part of the organizations. The organizations have not discharged those considerations, so the failure on their part to discharge their considerations certainly releases the management from that particular Rule.

Q. Does the—are the present rates of pay in force the same as those that are paid by other railroads in the Southeastern territory? A. They are not.

Q. Is this in acordance with Rule 46 of the Shop Craft Agreement? A. I believe it is.

Q. Could you read Rule 46 of the Shop Craft Agreement? A. It says:

"The Railway will, in the future, maintain rates of pay equal to those generally paid in the Southern Territory."

Now, I think our rates of pay are in excess of those in the Southeastern Territory, considering employees in all occupations.

In other words, this doesn't—this isn't confined strictly to railroad employees. It is rates of pay in the Southeastern Territory. Now—

372 Q. Just the Southeastern part of the United States? A. That's right.

Q. An average prevailing wage? A. That's right, in comparable positions.

Mr. Shapiro: I have nothing further of this witness.

Mr. Milledge: I have no questions. I'm going to call him as my own witness.

The Court: Well, is this the only witness the Government wants to call?

Mr. Shapiro: This is the only witness.

The Court: Before Mr. Milledge calls him, do you want to—

Mr. Devaney: I have no questions, Your Honor.

The Court: All right.

We may consider then that Mr. Shapiro has rested for the United States.

373 Mr. Shapiro: Yes, Your Honor.

The Court: And that Mr. Milledge is starting his case off by calling, by re-calling Mr. Wyckoff.

Mr. Milledge: As the Managing Agent of an adverse party under the Rule.

The Court: Yes, sir.

Raymond W. Wyckoff,

having previously been sworn, was recalled by the Intervenors as a Managing Agent of an adverse party and further testified as follows:

Direct Examination

By Mr. Milledge:

Q. Mr. Wyckoff, what information is on a seniority roster? A. Well, it depends on which craft you are speaking of. The majority of them have just the man's name and his Social Security number, listed in seniority order, date order.

The Court: The name and the date he went to work?

The Witness: And the—

374 The Court: Sometimes his Social Security number?

The Witness: —Social Security number.

By Mr. Milledge:

Q. It doesn't have a man's address on there? A. No.

Q. Or any other information, other than his name and possibly his Social Security number, and date? A. And some are divided up by work locations.

Q. According to seniority districts? A. That's right. Some seniorities are confined to points, for example, so you can tell where the man was located by the seniority roster.

Q. Do you presently have seniority rosters made up for the non-ops crafts? A. Within the last few weeks, I have made such rosters, yes.

Q. You do now presently have them? A. I have such rosters prepared, yes; I don't have them with me, if that's your question.

Q. The first ones that have been prepared since the—since January of '63, are these ones you have just

375 recently prepared? A. That's correct.

Q. And you have assigned each man to a particular craft? A. I don't quite follow your question.

The seniority roster doesn't assign them to a particular craft. He establishes seniority in the craft he enters service, for example.

Q. All right. But anyway, you have now made these things up? A. That's correct.

Q. All right. You hadn't made them up back—well, you have already answerd that.

Now, you were a part, were you not, of the negotiating team for the Florida East Coast involved in the wage dispute out of which this strike arose? A. Yes, I was.

Q. All right. And data was prepared of the costs to the Railroad of granting the 10.28 increase? A. Yes, it was.

Q. Could you give us an approximation of that cost, either on a monthly or a yearly basis, weekly, or whatever? A. It has been quite a while ago now that those negotiations took place but, as I recall at the time, based on
376 the employees in the service at that time, we anticipated the additional cost would be $331,000 a year.

Q. A year? And was Mr. Thornton approximately correct just a moment ago when he said that the cost of security to the Railroad at the present time, I mean, that is special security as a result of—that you have added since the strike, of approximately a thousand dollars a week? A. I don't think he said a thousand dollars a week.

The Court: He said a thousand a day, didn't he?

Mr. Milledge: A thousand a day?

The Court: Is that what he said?

The Witenss: As I recall it, yes.

By Mr. Milledge:

Q. Is that approximately right? A. Since Mr. Thornton is in charge of that, I would say that it's correct. I have no way of knowing.

Q. Oh, all right. So apparently the amount for security exceeds the cost of the wage increase? A. Based on those figures, yes.

Q. All right. Now, you sent out a letter, Mr.
377 Wyckoff, a letter that Judge Simpson referred to earlier, to several of the crafts dealing with passenger car—I mean, passenger business; did you not? Saying that they were all cut off, or saying that they lost their seniority rights? A. Well, let me answer it this way—

Q. All right. A. Certain of the agreements have provisions in them for the forfeiture of seniority. Included in those—

Q. But you sent out some letters along that line? A. It wasn't strictly for passenger employees, is what I'm getting at. I understood that to be your question.

Q. Well, to which organizations or which individuals in which organizations did you send these? A. As I recall, there were Train Porters, there were Redcaps, there were Coach Attendants and Train Maids, and there were Train Dispatchers.

Q. Train dispatchers? A. That's right.

Q. Outside of the Dispatchers, the other deal— well, you sent out one to the Dining Car Attendants, too, did you not? A. I said Coach Attendants; we don't have Dining Car Attendants.

Q. All right, Coach Attendants. Outside of Dis-
378 patchers, those were all dealing with passenger— those are people who dealt exclusively with passenger business, did they not? A. No. Train Porters, for example, handle baggage, handle mail.

Q. Well, you are not carrying any? A. We want to, but unfortunately the Government hasn't given us contracts to carry the mail.

The Court: You're not carrying any baggage either, are you?

The Witness: No, sir. We are not handling any passengers.

The Court: If you are not carrying passengers, you are not carrying baggage.

The Witness: That's correct.

By Mr. Milledge:

Q. So you sent out this letter. Now, was the letter based on your impression that the Injunction that His Honor entered, that this Court entered this month, required these letters to be sent out? A. No. It was based on my
379 impression of the meaning of the agreement.

Q. Well— A. The agreement—

Q. I just wanted to make— if you will just answer the question first and then make your explanation.

You didn't interpret this Injunction to require you to cut off, to terminate the seniority rights of these people? A. No, the—

Q. Or purport to? A. The Injunction required that we comply with the agreement to the fullest extent possible.

Q. All right. So we know, you didn't feel that you had to send these letters out? In other words— A. To comply with the agreement, yes.

Q. All right. Now, assuming that His Honor clarifies this Injunction on Motion, I take it then that you will withdraw these letters; is that correct? A. Well, I understood I was to comply with the agreements in their entirety.

Now, there are specific provisions in the agreement for this.

Q. Well, assuming there is a clarification, you will withdraw the letters? That's what I want to know?
380 A. If His Honor directs me to withdraw the letters, I suppose I'll have to.

The Court: This is a kind of an unexpected windfall, it seems to me.

The Witness: Sir?

The Court: I say, as far as you're concerned, this is kind of an unexpected windfall, to notify these people that they were cut off?

The Witness: I don't consider—

The Court: It wasn't the result that you had first anticipated by being under the Injunction.

The Witness: Well, I don't consider it a windfall, Your Honor. As I say, I was simply trying to comply with the agreements.

By Mr. Milledge:

Q. Would you be just as happy to keep these people on your seniority rosters? A. That wouldn't constitute
381 compliance with the agreement.

Q. So it's just a matter of getting the Injunction straight to—I mean, we could clear this thing up with a slight modification of the Injunction, to your satisfaction and to these people?

The Court: "Tis not so nominated in the bond."

The Witness: Excuse me, sir?

The Court: "Tis not so nominated in the bond." Merchant of Venice.

If he has to comply with the agreements, he's going to comply with them.

By Mr. Milledge:

Q. You—in other words, you take it as a matter of interpretation of these agreements that, even though you haven't operated the passenger service, you have the right to cut these people off and terminate their seniority after a year? A. Well, as I read the agreement provisions, there is no exception.

Q. In other words, if they didn't work for a year, for whatever reason, even though you weren't run-
382 ning any work, running any operation upon which they could perform work, that you are obligated to cut them off? A. That's the way the agreements have always been applied in the past.

The Engineers' agreement used to contain a comparable provision, because of—

Q. Have you ever had—you have never had a situation in which you had no job available for any man on the seniority roster for a year, have you?

TheCourt: Prior.

The Witness: In the history of this railroad? Yes.

By Mr. Milledge:

Q. You have? A. Yes. As I recall from reading the files, the Locomotive Firemen were on strike, back in the '25's—that strike was never settled. The shop crafts went on strike in the '20's. That strike was never settled.

Q. Well, that—so you never got around to this problem of what the interpretation of the agreement was then? A. I don't say that those particular agreements had a comparable provision in them.

Q. Oh, well.

383 Mr. Milledge: That's all I have.

The Court: Any questions?

Mr. Devaney: I have nothing further.

The Court: All right, come down.

(Witness excused)

Mr. Milledge: Mr. Cooke, please.

R. M. Cooke,

having been produced and first duly sworn as a witness on behalf of the Intervenors, testified as follows:

Direct Examination

By Mr. Milledge:

Q. Would you state your name, please. A. R. M. Cooke.

Q. And where do you live, Mr. Cooke? A. At New Smyrna Beach, 1202 Live Oak Street.

Q. And do you have an official capacity with a labor organization? A. Yes. I am General Chairman of the Brotherhood of Railway Carmen of America, and

384 President of System Federation 69.

Q. Does System Federation 69 have a collective bargaining agreement with the Florida East Coast? A. Yes, it does.

Q. Is there a provision in that agreement permitting the management of the Florida East Coast to grant equivalency —well, let's strike that.

What are the qualifications to be a journeyman under System Federation 69? A. Four years experience at the classification that you are making application for.

Q. Is that—And that's four years experience as an apprentice? A. Either four years experience as an apprentice or four years experience as a mechanic in some other railroad industry.

Q. All right. Is there any provision for waiving that—waiving any part of this by the management for experience in non-railroad work? A. There is a special agreement that was signed, I think originally, in 1942 that provides that mechanics can be employed with less than four years experience at the trade, provided it is by agreement between the Local Management and the Local Shop Committee.

385 Q. Outside of that, is there any provision for the management unilaterally granting journeymen rights or mechanics rights to someone— A. No, there are none that I know of.

Q. —with less than four years experience, railroad experience? A. There is also a supplement allowing them to advance apprentices under certain specified conditions;

First, those with three years experience, and then again, those with two years experience.

I don't think that it goes beyond that. I'm not aware that it does.

The Court: Is that supplement a part of this Exhibit 4 at the May hearing?

Mr. Milledge: Sir?

The Court: Are all these—is that supplement he's talking about a part of it—

Mr. Milledge: Yes, sir.

The Court: —in this brown envelope over here?

386 Mr. Milledge: Yes, it is.

The Court: Is that correct? I'm not making a statement; I'm asking a question.

Mr. Milledge: We certainly intended that that be the case, back in May. I think we had all supplements to all contracts. And there is in this System Federation 69 agreement a limitation on the number of apprentices that may be hired at any one time?

The Witness: Yes, there is.

By Mr. Milledge:

Q. And that is on the basis of a ratio? A. A ratio of one apprentice to each five mechanics in the craft that he is joining.

Q. All right. In addition to that, there is an age requirement, and so forth, of apprentices? A. Correct. 17 to age 22.

The Court: 17 to what, Mr. Cooke?

The Witness: To the age of 22, Your Honor.

387 By Mr. Milledge:

Q. Now, we spoke a minute ago about Rule 43, the one that deals with—do you have your contract or copy of the contract? A. No, I don't. I have it back there.

The Court: Do you want to go back and pick it up.

By Mr. Milledge:

Q. Why don't you get it. A. All right, sir. (Proceeding to table and obtaining instrument and returning to witness stand)

Q. Rule 46 has to do with this? A. Rule 46(a).

Q. Rule 46 has to do with rates of pay? A. That's correct. It is titled, "Fixing Rates of Pay".

Q. And what provision does it make for rates of pay? A. Paragraph (a) says:

"The Railway will, in the future, maintain rates of pay equal to those generally paid in the Southeastern Territory."

Q. Prior to the strike, did this Railroad pay the same rates of pay paid by the Southeastern railroads?

388 A. Yes, they did.

Mr. Devaney: Your Honor, I object to this. We are here on the basis of complying with the contract. This contract contemplates wage rates in it and I think that any attempt by Mr. Milledge to convince the Court that we are obliged to pay a different wage rate because of some other provision that he is referring to requiring wage rates to be not less than those in the Southeastern Territory is entirely improper.

The Court: It's in the contract, the contract here, the one that you say you are complying with.

Mr. Devaney: That is right, Your Honor, but it's perfectly obvious it's a question of contract interpretation and it has no point in being before this Court. If there is a dispute about it—

The Court: If it's a question of interpretation, the interpretation placed on it by the parties having the claims has some bearing; doesn't it?

389 Mr. Devaney: I don't believe that it does, Your Honor, for the simple reason that they are referring to a provision which, in prior years, this Railroad was a part of the negotiations by the Southeastern Carriers Conference Committee. For this reason, to go back to what existed immediately prior to this strike has no application whatever. This Railroad was not party to the national handling that involved the entire non-operating unions' dispute in 1960. It has not been party to any national handling of any dispute since that time.

The Court: That is not what's involved here. What's involved here is this contract.

Mr. Milledge: That's right.

Mr. Devaney: That's correct, Your Honor, but it's a perfectly obvious situation that there is a difference of interpretation. It involves the construing and applying of the contract.

The Court: I heard Mr. Wyckoff's interpretation without any objection from you or anybody else.

390 Mr. Devaney: Well, those were not questions that I asked, Your Honor. We went into it to a degree. But I am merely saying that I think this is a matter of contract interpretation, that it does not belong before this Court; that if there are claims that the Union has, that the Railway Labor Act provides a forum for the determination of any dispute involving the interpretation and application of an agreement.

What we are required to do under the Order of this Court is to comply with the agreement. Now, where we disagree as to the meaning of the contract itself, this is a matter for the Adjustment Board.

The Court: The objection is overruled.

You may proceed.

By Mr. Milledge:

Q. And did this Railroad, prior to this time, pay rates not less than those paid by the other railroads in the Southeastern United States? A. Yes, they did.

Q. Is that the meaning of Southeastern Territory,

391 in your contract? A. In my way of thinking, yes.

Q. Well, the rates have always been the same, have they not? A. That is correct.

Q. Have they ever been—did the Southeastern Territory have any—are there any statistics published by the Department of Labor, or something like that, that you have ever heard of that set a rate for all persons in the Southeastern United States? A. No, not that I'm aware of, no.

Q. Now—

The Court: Well, let me get something clear about this: Car inspectors, they inspect and bad order cars, they go and look for the violation of the Safety Appliance Act?

The Witness: Yes, sir.

The Court: And bad order a car and it has to go out of service or the Railroad is violating the law?

The Witness: Yes, sir.

392 The Court: Industry in general, as far as you know, does it have any car inspectors? I mean, in other than the railroad industry?

The Witness: No, sir, only in the railroad industry, as far as I know.

The Court: All right, sir.

By Mr. Milledge:

Q. You received a number—

The Court: That would be, as opposed to something perhaps like a sheet metal worker who might work in a number of other industries, it would seem to me a car inspector is confined to the railroad industry; I don't know.

Go ahead, Mr. Milledge.

By Mr. Milledge:

Q. In any event, by past practice, this Railroad has paid all crafts in System Federation 69—as a matter of fact, the same as the other Southeastern railroads? A. Generally, yes; on one occasion, we managed to secure an adjustment on the Helpers' rate of pay on the Florida East Coast based on what the ACL was paying

393 under this Rule. It was only two cents but an adjustment was made on it.

Q. So that you actually obtained an increase based on that? A. Obtained an increase—I did not; now, this was handled under the terms of the previous General Chairman, but an increase was obtained which amounted to two cents per hour for the helpers on this property, based on what was paid by the Atlantic Coast Line.

Q. Now, Mr. Cooke, in the "Conditions of Employment", that document was handed out before to everyone on the Railroad and also the "Uniform Working Agreement" which was the September 24th Notice, both of those provided for an eight-hour day or an eight-and-a-half-hour day with thirty minute lunch period.

Your are sufficiently familiar—A. I think that's right, yes. That's correct.

Q. Now, what does your contract provide in regard to the length of a working day?

Mr. Devaney: Your Honor, I object.

The testimony already shows that we are in compliance with the provisions of the contract with regard to—

394 Mr. Milledge: I think that's in dispute and I will—

Mr. Devaney: What's in dispute here?

The Court: Is it in dispute?

Mr. Milledge: It certainly is, Your Honor. That's why it takes a few questions to get to it. I will show, Your Honor, the bids. They are still bidding, bulleting them, on an 8½ hour day, not on an 8 hour day.

They tell Your Honor they are in compliance but there's some doubt about that.

The Court: Well, certainly you have a right to go ahead and make a showing. I just didn't realize—

Mr. Milledge: Yes.

The Court: —there was any dispute about this matter. Go ahead.

Mr. Milledge: Well, we can wait and bring it up on a contempt basis, but I think it's better to maybe let

395 it come out right now.

The Witness: Well, that is contained in Rule 2 of this agreement, if you would like me to read it. May I read it?

By Mr. Milledge:

Q. I think it would be helpful. A. Rule 2 is entitled, "Shifts":

"(a) There may be one, two, or three shifts employed. The starting time of any shift shall be arranged by agreement between the Local Officers and the Employees' Committee, based on actual service requirements.

"(b) The time and length of the lunch period shall be subject to agreement, preferably within the limits of the

fifth hour, except where three shifts are employed, when the lunch period shall be twenty minutes without loss of time."

Q. Now, you have received bids, have you not? A. I have received bulletins and bids.

Q. Do the bulletins—what is the length of the day?

396 A. Well, of the bulletins that have been issued at New Smyrna Beach in my department—

The Court: You are speaking of these, November 2nd, from November 2nd forward bulletins?

The Witness: Yes, sir.

Mr. Milledge: Yes, sir.

The Court: New bulletins?

Mr. Milledge: New bulletins.

The Court: Since the October 30 Order?

Mr. Milledge: Yes, sir.

The Court: All right.

By Mr. Milledge:

Q. The new bulletins? A. On all of the bulletins I've received on the positions at New Smyrna Beach, the starting times have been changed to one hour later than

397 they were at the time of the strike or prior to the strike.

The lunch periods have been changed to thirty minutes, in addition to the eight-hour shift, in other words. My shift there was from 7:00 to 3:00. Now, it's from 8:00 to 4:30.

Q. With 30 minutes for lunch? A. That's right.

Q. Prior, you were working from 7:00 to 3:00? A. Right.

Q. With a 20-minute lunch hour? A. Yes, sir, right.

Mr. Milledge: That's all I have.

The Court: The Plaintiff didn't put any actual bulletins in, did they? Mr. Devaney didn't introduce any actual bulletins?

Mr. Milledge: No, perhaps it would be well if we—

The Court: I think you might consider identifying one and putting it in this record.

You're talking about what's in a written document.
398 If you have one, it's better to have it in the record.
Mr. Milledge: Almost all the ones I have, Your Honor, have some writing on them but—
The Court: If you can erase it, or I can overlook the writing and just—
Mr. Milledge: Do you have one that doesn't have writing on it?
The Witness: There is a New Smyrna bulletin, pre-strike. (Producing) Let's see if I have—

By Mr. Milledge:

Q. Have you got one that isn't marked? A. Yes. (Producing instrument) There is the prestrike bulletin. There is a recent one. (Producing)
Q. Now, Mr. Cooke, you've handed me two bulletins. One is dated April 13, 1963; that is a pre-strike bulletin pertaining to carmen. Is that a carmen's job? A. Right.
Q. At New Smyrna? A. Right.
Q. And—
399 Mr. Devaney: What is that date, Mr. Milledge?
Mr. Milledge: April 13, 1962.

By Mr. Milledge:

Q. And then you have handed me another one, which is November 27, 1964, and the second one is one that also pertains to a carman's job, doesn't it? A. Right.
Q. At New Smyrna? A. That's correct.
Q. Now, the one on April 13, 1962 shows what time for work? A. This is a double bulletin. Actually, it is an award of one position and an advertisement of another one. Both positions are first shift, 7:00 a.m. to 3:00 p.m.
Q. And under the contract, how much time for lunch? A. 20 minutes for lunch, preferably during the fifth hour.
Q. And that's 20 minutes out of the 8 hours? A. That's right.
Q. Now, the bulletin of November 27, 1964, has something to say about the time of work? A. It is a first shift

400 position advertised 8:00 o'clock a.m. to 4:30 p.m., less 30 minutes meal period.

Mr. Milledge: We offer these two as Intervenors'—

The Clerk: No, 1, I guess.

The Court: Did the Intervenors have any numbers earlier?

The Clerk: Not that I can see by the transcript. I would have to get the file. It doesn't show.

The Court: We should start him off where he left off, just like we did the Defendant. It isn't that important; put it No. 1. Start with No. 1 for this hearing, at this hearing.

(Thereupon, Intervenors' Exhibit No. 1 was received and filed in evidence.)

Mr. Milledge: That's all the questions I have of this witness.

The Court: Cross-examine.

Cross Examination

By Mr. Devaney:

Q. Mr. Cooke, this bulletin which has been intro-
401 duced as Intervenors' Exhibit 1, for 1962, how many shifts were being operated in New Smyrna Beach at that time? A. There were three shifts being operated.

Q. And the provisions of your agreement provide that the lunch period shall be 20 minutes when there are three shifts; isn't that correct? A. That's correct.

Q. And how much time was allowed in 1962, where there were only two shifts? A. I was trying to think of a point where we had two shifts; I don't know.

Q. You don't recall whether— A. Well, the Locomotive Department in New Smyrna had only two shifts and they took the same lunch period that we did.

Q. You are saying that they took 20 minutes? A. That's correct.

Q. You are certain it wasn't 30 minutes? A. In the Locomotive Department at New Smyrna?

Q. Well— A. Definitely 20 minutes.

Q. Where they had only two shifts? A. Definitely, they worked the same shift we did.

Q. Now, what—I don't quite understand your com-
402 plaint, Mr. Cooke, as to how we are not in compliance. Is this because you have not agreed to the new starting time? Is that the— A. I have no complaint. I—

Q. Well, the argument is that we are not in compliance with the present bulletin, because the starting time is different.

Now, is this because you have not agreed to the new starting time? Is that your contention? A. I would have had nothing to do with agreeing with the starting time, Mr. Devaney. It would have been handled by the Local Shop Committee and the Local Management. I'm not a part of either one.

Q. Is it because the Local Shop Chairman or Committeemen did not agree with the new starting time? A. That would be the violation there, yes.

Q. That's your alleged violation? A. Yes.

Q. Now, prior to the strike, Mr. Cooke, weren't there proposed changes in hours at New Smyrna Beach? A. Not at New Smyrna Beach, that I'm aware of.

Q. Weren't there proposed changes that were discussed with you, Mr. Cooke? A. At Miami, but not at New Smyrna Beach.

403 Did you agree to them at Miami? A. No, I did not agree to them.

Q. Now, since the strike, your people have respected the picket lines; isn't that correct? A. My people are on strike.

Q. And haven't you also written to the effect that you have instructed your members not to return to work? A. That's correct.

Q. Now, under these conditions, how could you have agreed on the starting time, or how could the Local Chairman have agreed on the starting time for people that you were refusing to permit to work? A. Well, it would have been a little bit hard, I'm sure.

Mr. Milledge: Excuse me. All this—Mr. Cooke didn't ask to set up these things and that's not it. The problem is over the fact that they are working them 8 hours instead of 7 hours and 40 minutes.

Mr. Devaney: Now, Your Honor, that is what I wanted to develop with Mr. Cooke, and I would like again for Mr. Cooke or Mr. Milledge, either one, to point to the
404 provision of this agreement that has any such provision in it.

The Court: Well—

Mr. Devaney: Now, he has made this statement twice. He has referred to a provision that is not applicable, unless there is a three-shift operation.

The Court: Excuse me. I think it would be perfectly proper for you and Mr. Milledge to argue it out when you get through. I don't consider it proper for you to argue it out with the witness at this time.

If there is an objection to the question, I sustain the objection.

Mr. Devaney: Now, Mr. Cooke—

The Court: You'll have to make your argument to me and not to the witness. He is simply called as a witness. He is produced to produce some papers here and he is not the one making the argument. It's his counsel.

By Mr. Devaney:

Q. Now, Mr. Cooke, under Rule No. 2, the only provision here for the payment for the lunch period is
405 when there is a three-shift operation; isn't that correct?

Mr. Milledge: Now, Your Honor, I think this is the same thing.

He has pointed out the Rule. I'll make the argument. He has asked him what was the practice. He testified about it.

The Court: Objection sustained.

By Mr. Devaney:

Q. What was the practice prior to the strike, Mr. Cooke, for the payment for the lunch period for people who were not on a three-shift operation? A. Well, as I've explained, at New Smyrna, we had—for instance. the rip track worked only one shift and that was where I was employed. And we had only one shift on the rip track and we took 20 minutes off for lunch, with pay. We worked from 7:00 a.m. to 3:00 p.m. There was no second shift or no third shift.

Q. Now, as I read Rule No. 2, the provision says that:

"The time and length of the lunch period shall be subject to agreement—"

A. That is my understanding.

406 Q. "The ime and length of the lunch period shall be subject to agreement, preferably within the limits of the fifth hour, except where three shifts are employed, when the lunch period shall be 20 minutes without loss of time."

A. That's the way I understand it.

Q. The limitation here and the practice was that you got 20 minutes with pay when you had three shifts.

Now, do you have any documents or records—

Mr. Milledge: Excuse me.

He just testified that that wasn't their practice. Evidently Mr. Devaney just put some words in his mouth.

The Court: I don't—I'm not sure I understand, Mr. Milledge.

Mr. Milledge: Well, I'm not sure what Mr. Cooke said but I think he said yes to some long question, which would

be exactly contrary to what he just finished testifying; so it must have been some misunderstanding.

407 The Court: Continue. That's all right, go ahead.

By Mr. Devaney:

Q. Now, is your familiarity limited to New Smyrna Beach, Mr. Cooke? A. No, it is not.

Q. Now, where, other than New Smyrna Beach, were there operations where there was only one shift? A. At no other point that I'm aware of.

Q. You are saying that, to your knowledge, people who worked on a single-shift operation were paid for the lunch period prior to the strike? A. I was myself. I was in that position myself.

Q. At New Smyrna? A. At New Smyrna Beach on the repair track. We had only one shift.

Q. And you are saying that you were paid and that you got a 20 minute lunch period? A. Yes, sir, I did.

Q. Now, other than Rule No. 2, Mr. Cooke, are there any other provisions that relate—of this agreement that relate to the lunch period? A. I don't recall at the time that there is.

Q. Well, I mean, you have it. Is there any other

408 provision that relates to the lunch period? A. To the lunch period? Also, Rule 3, "Pay for Lunch Period". Well, that has only to do with lunch periods on the overtime basis though.

I don't recall at the time, Mr. Devaney, of any other Rule.

Q. Is there any other Rule, Mr. Cooke, that relates to the number of hours in the work day, other than Rule No 2? A. The number of hours, yes. Rule No. 1 is "Hours of Service" Rule.

Q. What does that provide, Mr. Cooke? A. Would you like me to read it?

Q. Yes, I would. A. "An eight (8) hour period shall, under provisions hereinafter set out, be the regular work

day. A forty (40) hour week shall, under provisions hereinafter set out, be the regular work week. Regular work day and work week hours shall be bulletined. All employees coming under the provisions of this agreement, except as otherwise provided in this Schedule of Rules, or as may hereafter be legally established between the
409 Carrier and the Employees, shall be paid on the hourly basis.

"Establishment of shorter work week.

"NOTE:—"

Q. This is quite long. Let me ask you this:

Would you go over those provisions, Mr. Cooke, and tell me whether any of them relate to whether or not the lunch period is to be part of the time paid for? A. (Examining agreement) No, sir, none that I see in that Rule, unless I overlooked it.

Q. Is there any other Rule, to your knowledge, that would relate to the hours of service and the payment or nonpayment of the lunch period, other than Rule 2, as we have already looked at; and you have referred to Rule 3 for overtime? A. No, that's the only one that I know of.

Q. Now, Mr. Cooke, on the question of Rule No. 46:

Did you negotiate that Rule? A. No, sir.

Q. So when you are talking about the intent, you had no personal knowledge of what was intended by the Rule in the course of the negotiations; is that correct? A. I have all the records of the previous General Chairman and that is what I am basing the statement that I
410 made earlier about the helpers' pay being adjusted at one time on the basis of this Rule. It was from the records that I have of his.

Q. But you know nothing about the negotiations, because you were not present? A. No, sir. I was not present.

Q. Now, isn't it correct, Mr. Cooke, that you personally submitted a dispute some time ago involving the same assertion that you are now making that Florida East Coast should have paid a higher rate than it was paying? A. As I recall, I did it some time in June of 1962, yes.

Q. And isn't it true, Mr. Cooke, that that matter was not resolved in your favor or else was dropped and not resolved at all? A. Well, it was not resolved at all. I let it die under the 60-day provisions of the August 21, 1954 agreement. I just did not progress it.

Q. Now, did I understand your reference to the advancement of the apprentices to mean that, under the supplement to the agreement, apprentices who had had only two years training could be advanced to a journeyman status if they possessed the sufficient qualifications to be
411 advanced to that position? A. I think that's about the third step provided in that memorandum, apprentices.

Q. Is that part of this agreement? A. Yes, sir, it's in the back.

It is the memorandum of understanding between the Florida East Coast Railway Company and the Federated Shop Crafts.

Q. May I ask the page? A. Well, it's page 84 actually; I didn't realize it was numbered, dated March 4, 1942.

Q. Fine, thank you.

Now, there is nothing in this, as I read it, Mr. Cooke, that relates to where a man begins the apprenticeship training or, that is, at what step of the apprenticeship training he commences his training? A. No. I think that part of the apprentice training is contained in Rule 32.

Q. That would be the one appearing on page 38; is that correct? A. Yes, sir, that's correct.

Q. Now, are you saying that under this, Mr. Cooke, that it was not permissible to take a person with experience as a machinist, for example, in another industry and put him at some level of the apprenticeship training
412 program, rather than the first rung of that program? A. We have never credited anything except railroad experience to any applicant throughout the years that I've been involved.

Q. Except that the supplement that you referred to, on

page 84, clearly permits the advancement of apprentices after two years of railroad experience; is that correct? A. That's correct.

Q. Now, I didn't quite understand your testimony about the provision for waiving. What did the waiver relate to? A. The waiver on what? I don't understand.

Q. Well, it was asked in connection with your apprenticeship program and you indicated that there was a provision for waiving by special agreement.

Now, was this—did you intend this to be limited to the advancement under the memorandum that appears on page 84? A. Yes, under this March 4, 1942 memorandum. That's what I had reference to.

Q. Now, going back again, Mr. Cooke, to the Intervenors' Exhibit 1, do I understand you to be saying that the change in the shift of hours from 7:00 a.m. to 8:00 a.m. is without objection? You don't—you are not
413 saying that that is a violation of the agreement? Or are you saying it's a violation of the agreement? A. I would say that it is a violation of the agreement.

Q. All right. Now, why are you saying that it is a violation of the agreement? A. Because the starting times and the lunch periods were changed without any—

Q. Let's forget lunch period just a minute. A. All right. The starting time—

Q. Now, the starting time? A. The starting time and the quitting time were changed without any consultation with the Local Committee.

Q. Now, during the period that you are on strike, you also stated that it would have been a bit difficult to have agreed on a change in hours for people that you have encouraged not to work at all; isn't that correct? A. I don't recall saying it just like you put it.

Q. Well, you are on strike; isn't that correct? A. Yes, sir, that is correct.

Q. You are not actually in a position that you are willing to agree on any such matter; isn't that a reasonable state-

ment? A. That's reasonable, yes, sir. I don't think
414 I would have agreed to the change had I been a member of the Committee.

Q. Now, on the lunch hour, we have covered that.

You contend that the lunch hour—and, incidentally, how many shifts are now being worked at New Smyrna? A. I have have no knowledge of that; I couldn't say.

Q. Well now, are you asserting that this is a violation on the belief that three shifts are being worked, or that less than three shifts are being worked? A. No, sir. I'm saying that it's a violation on the assertion that the Local Committee was not consulted on the change of shifts.

Q. All right. Now, on the lunch itself, are you saying that this is a violation because the lunch is not paid for and three shifts are being worked? Or is it your contention that the meal period must be paid for, regardless of how many shifts are worked? A. I merely said it was a violation because the shift was changed, deleting the 20-minute lunch period with pay and instead instituting a 30-minute lunch period without pay.

Q. Well now, it is clear, is it not, Mr. Cooke, from your testimony that in 1962 three shifts were being worked at New Smyrna Beach on all but a few that you have
415 made reference to, on the rip track and a few other locations where only one shift, I believe you testified, was being worked and in others perhaps only two shifts? A. At New Smyrna Beach, there were three shifts employed in the train yard. Those were the car inspectors and car oilers.

The repair track, where I worked, had only one shift—7:00 a.m. to 3:00 p.m.

The locomotive shop had two shifts, from 7:00 a.m. to 3:00 p.m. and from 3:00 p.m. to 11:00 p.m. I'm aware of that because I worked over there occasionally as engine house carpenter.

Q. All right. Now, are you saying that everybody at New Smyrna, whether they were on one, two, or three-

shift operation, got this same 20 minute lunch period and that it was paid for by the Company? A. You are speaking of New Smyrna?

Q. New Smyrna, that's correct. A. Yes, sir.

Q. Whether it was one, two or three shifts? A. Yes, sir.

Q. And it is your contention now, that because the lunch period isn't being paid for, that that's a violation; is that correct? A. It is a part of the violation. The change shift is the main violation.

416

Q. You consider the change in the shift the main violation? A. Yes, sir.

Q. Yet you just testified you wouldn't have agreed to the change if you had been asked? A. I doubt that I would have.

Q. Now, you also have stated that there was no other provision, insofar as you are aware, other than Rule 2 which relates to the lunch period? A. Well, that's correct; none that I'm aware of.

Q. This is the one that you are basing your contention that there is a violation with respect to the lunch period, is Rule 2; is that correct? A. That's correct.

Q. Now, in the apprenticeship provisions, Mr. Cooke, either Rule 32 or the other agreements relating to it, is there any provision which limits the Company from placing individuals with outside exeperience in higher levels of the apprenticeship program? A. Nothing other than past practice. We have never credited outside experience, not even a painter which you would naturally think might fall into the right category. It had to be railroad painting, for instance, to qualify as a four-year painter.

417

Q. Now, did I also understand, Mr. Cooke, that your knowledge of this adjustment that you referred to with respect to the helpers was based on information that you got from files, not on personal knowledge? A. From the former General Chairman's records and from records of the Second Division Railroad Adjustment Board.

Q. Was there a decision in that matter, Mr. Cooke? A. I believe—I'm not positive of that, Mr. Devaney, whether it was carried all the way to the Board or whether it was settled on the property. I know that the final settlement signed with Mr. Hunt allowed two cents per hour. I'm aware of that because I went that far into it.

Q. The agreement was signed with whom? A. With Mr. R. B. Hunt.

Q. R. B. Hunt. And who was Mr. R. B. Hunt? A. He was—they've changed the title to the position so much, I'm not sure; I think it was Superintendent of Motive Power and Machinery for Florida East Coast.

Q. Do you recall or have any knowledge, Mr. Cooke, of what shifts were operated at New Smyrna Beach from the time the Railroad began the resumption of its operations, on and after February 3rd of 1963? A. No, sir. I'm not aware of it.

418

Q. You do not know whether the shift differed in 1963, or at any time in 1964, from the time it had originally started in 1962? A. No, sir. The first news that I had that it had been changed was when I received these bulletins recently. I had no knowledge of what they were working prior to that.

Q. These aren't the first bulletins you have received, are they, Mr. Cooke, since the strike began? A. I have received about three or four previously from Bowden, but these are the first bulletins I've ever received from New Smyrna Beach.

Q. Well, what was the situation at Bowden? Did you detect any change there? A. There have been no changes that I see in the Bowden bulletins.

Mr. Milledge: Excuse me.

Your Honor, it would be irrelevant anyway. They haven't operated under these contracts, the labor contracts, until, they say, November 13th of this year. It's entirely irrelevant what shifts they worked under some other agreement.

419 Mr. Devaney: Your Honor, I think the established starting time, if it has been changed over a period of time, is part of the consideration here. It doesn't—

The Court: Well, he has been on strike and he hasn't been bulletined and I don't know how he can help you any.

Mr. Devaney: Well, I think he just testified that he has received bulletins from Bowden, although he has not received any involving—

The Court: I heard him.

Mr. Devaney: —New Smyrna.

By Mr. Devaney:

Q. Now, at Bowden, Mr. Cooke, what is the situation there on the payment of the meal period?

Mr. Milledge: Excuse me, I object on the basis it's irrelevant what other violations of the contract the Railroad has been engaged in when admittedly not working under these contracts.

420 The Court: I can't see that it has anything to do with it, but go on and answer.

The Witness: As I recall from the bulletins that I have received recently, it is still on the same basis that it was before, 20 minutes off for lunch with pay.

By Mr. Devaney:

Q. Now, how many shifts are being operated at Bowden; do you know?

The Court: He doesn't know.

The Witness: No, sir, I don't.

By Mr. Devaney:

Q. I mean, at the present time?

The Court: He isn't working for the Railroad.

Mr. Devaney: Well, he has had opportunities, I'm sure, Your Honor, to find certain information. They maintain pickets, for example, at the entrances to Bowden yard.

I'm certain he knows whether they are working one, two or three shifts.

421 The Court: He says he doesn't and I agree with him; there is no reason to know.

By Mr. Devaney:

Q. Did I understand correctly, Mr. Cooke, that you hold a position not only in the Carmen's Union but in System Federation 69? A. Yes, sir, that's right.

Q. And if I recall correctly, System Federation 69 includes other than shop craft unions? A. The other five, yes, sir, besides my own.

Q. Now, other than your own Union of the Carmen, are you asserting that there is any violation with respect to starting time or the meal period as to any of the people making up System Federation 69? Other than the Carmen? A. No, sir. I have only received Carmen bulletins. I'm not aware of how the positions are being bulletined for the other crafts.

Q. You have not in any event been advised by any of the constituent members. And you are the President of System Federation 69? A. I have had one bulletin handed me by the Boilermakers' Local Chairmen at New Smyrna Beach and, honestly, I haven't even looked at it. I

422 have it with me if you want me to bring it out.

Q. But you have not been advised by any of your constituent labor organizations that there is any violation of their agreements? Well, it would be the same agreement, wouldn't it, Mr. Cooke? A. Yes, sir, it's the same agreement.

Q. Now, have any of those organizations told you or represented to you that the starting time or lunch period was being violated? A. Since arrival here in Jacksonville, Mr. McDougall of the Machinists, General Chairman of the Machinists, tells me that his are at New Smyrna just like mine, being violated.

Q. This would be the same Rule? A. Yes, sir.

Q. The same agreement; is that correct? A. Yes, sir.

Q. The only one, this is the only agreeemnt that we are talking about for all the shop crafts? A. Well, understand there are other agreements that go with this, supplements. This is the basic Federated agreement though.

Q. But all of them, all shop crafts and all that make up System Federation 69, are signatories to this agree-
423 ment? A. No, sir. The Firemen and Oilers are not. They have a separate one, which looks about like this. It's a little brown book.

Q. But they are members of System Federation 69? A. Yes, sir, they are, but they are not covered under this one.

Q. They have a separate one? A. Yes, sir, that's right.

Q. All right. Other than Mr. McDougall, who else has told you? A. Mr. DuPont of the Electrical Workers. Those are the only two that I've talked to.

Q. Mr. Cooke, would you refer again to Rule 2? A. Yes, sir.

Q. Under Rule 2, Mr. Cooke, would it have been permissible to request an eight-hour-and-thirty-minute shift with no payment for lunch where you were operating less than three shifts? A. Yes, sir.

Q. To do it by agreement? A. It would have.

Q. And it wouldn't have been in violation of Rule 2? A. What made it in violation was the fact that the Local Committee was not asked or consulted.

424 Q. So it is the fact of consultation that you really are saying is the violation? A. Yes, sir.

Mr. Devaney: No further questions.

The Court: A unilateral change is what he is saying.

Redirect Examination

By Mr. Milledge:

Q. An unilateral change makes the men work 30 minutes more than they did without the unilateral change? A. That's correct.

Mr. Milledge: That's all.

Mr. Shapiro: No questions.

(Witness excused)

Mr. Milledge: That's all the Intervenors have, Your Honor.

The Court: He said Mr. McDougall of the Boilermakers and Mr. DuPont of the—

Mr. Milledge: He is an electrician.

425 The Court: —of the Electricians; since he has been here in Jacksonville had.

One other thing—oh, yes, he lives in New Smyrna at 1202 Live Oak. I didn't think he had given that.

Mr. Devaney: I'm sorry. Was that all the Intervenors had, Your Honor?

The Court: He announced closed.

Do you have any further testimony?

Mr. Devaney: Yes. I would like to recall Mr. Wyckoff.

The Court: Would you gentlemen just as soon argue this thing in the morning, after this witness? This will be the only witness, won't he?

Mr. Devaney: That's all, Your Honor.

The Court: Are any of you pressed to bet back somewhere?

Mr. Devaney: No, Your Honor.

426 The Court: Can we go on? How about you, Mr. Shapiro?

Mr. Shapiro: I have no official reason to be back in Washington.

The Court: Well, it's half-past 5:00 and, rather than keep myself and these gentlemen here any later, I think I'll take it in the morning. And you might be able to give me, aside from some rebuttal from Mr. Wyckoff, that's all that you will have?

Mr. Devaney: Yes, Your Honor.

The Court: So you gentlemen might be preparing your, whatever argument you want to advance with that in

mind, and we will take the argument and get through, I think, at an early hour in the morning.

9:30, please, Mr. Marshal.

Mr. Milledge: Your Honor, I know that you have announced adjournment but, just so that we wouldn't have to hold our people for whatever rebuttal, is this rebuttal only going to go to this testimony of Mr. Cooke?

427 Mr. Devaney: Yes, sir.

Mr. Milledge: Is that what it is?

The Court: Then I think everybody can go, then.

Thereupon at 5:30 o'clock p.m., on Tuesday, December 1, 1964, the Court adjourned to be reconvened at 9:30 o'clock a.m., on Wednesday, December 2, 1964.

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428 At 9:30 o'clock a.m., on Wednesday, December 3, 1964, pursuant to adjournment of the preceding session, the Court reconvened and the following further proceedings were had:

The Court: Good morning, Gentlemen.

Counsel: Good morning, Judge.

Mr. Devaney: Mr. Wyckoff.

Raymond W. Wyckoff

having previously been sworn, was recalled by the Defendant in rebuttal and further testified as follows:

Mr. Devaney: Would you mark this for identification?

The Clerk: KK.

(The referenced material was marked Defendant's Identification Exhibit KK.)

Direct Examination

By Mr. Devaney:

Q. Mr. Wyckoff, I hand you this document, which has been marked for identification as Defendant's Exhibit KK.

Would you tell us what this document consists of?

429 A. It's a series of bulletins advertising jobs in the shop crafts in 1961, through and including January 3rd, 1963.

Q. Are these bulletins all in regard to a particular location? A. Yes, these are jobs located at the Miller Shops, outside of St. Augustine.

Mr. Shapiro: What shops?

The Witness: Miller.

The Court: Miller, at St. Augustine.

By Mr. Devaney:

Q. Now, prior to the strike, Mr. Wyckoff, how many places were there that operated on a three-shift basis, insofar as the shop crafts were concerned? A. Well, we had three shifts working at Bowden, at New Smyrna Beach and Hialeah.

Q. And what were you working at Miller Shops? A. One shift.

Q. And these bulletins represent the hours worked in the shop crafts at Miller Shops; is that correct? A. That's correct.

430 Mr. Devaney: I move that Defendant's Exhibit KK be received in evidence.

Mr. Milledge: If I might just ask a single question on voir dire?

The Court: Surely.

Voir Dire Examination

By Mr. Milledge:

Q. Is Miller Shops still in operation? A. Yes, it is.

Q. At the present time? A. Yes, it is.

Mr. Milledge: We have no objection.

Mr. Shapiro: The Government has no objection.

The Court: Mark KK in evidence.

(Thereupon, Defendant's Identification Exhibit KK was received and filed in evidence.)

Further Direct Examination

By Mr. Devaney:

431 Q. Mr. Wyckoff, I hand you again Defendant's Exhibit KK.

Will you examine those bulletins and tell me what was done with respect to the allowance of a meal period at Miller Shops? A. Well, a 30-minute period within which to eat was set forth, and that 30 minutes was not included in the working hours.

Q. Does that mean that it was not paid for? A. That is correct.

The Court: What hours do they run down there? 7:00 to 3:30?

The Witness: 7:00 to 12:00 and 12:30 to 3:30.

The Court: 7:00 to 12:00 and 12:30 to 3:30.

By Mr. Devaney:

Q. At the present time, Mr. Wyckoff, where are three shifts in force on the Florida East Coast, insofar as the shop crafts are concerned? A. At Hialeah.

The Court: Hialeah only?

432 The Witness: Yes, sir.

By Mr. Devaney:

Q. Now, can you tell me, Mr. Wyckoff, what is being done at Hialeah with respect to the payment of the lunch period? A. 20 minutes within which to eat has been included in the hours of payment.

Q. And you are not then operating three shifts at New Smyrna? A. No, we are not operating three shifts at any other point, other than Hialeah.

Q. Now, Mr. Wyckoff, do you have—

The Court: Well, excuse me. Bowden is on two shifts?

The Witness: Yes, sir.

The Court: And New Smyrna Beach is on two shifts?

The Witness: It's on one.

The Court: New Smyrna on one; Bowden on two.

433 Mr. Devaney: Do you have the agreement? I've forgotten the number of it, the brown book?

The Clerk: They never did get the original out of there. They were using—

Mr. Milledge: We were using copies. Mr. Wyckoff has one.

Mr. Devaney: Oh, you have one there? All right.

Mr. Shapiro: May I make a suggestion, Mr. Devaney?

Mr. Devaney: Yes, you may.

Mr. Shapiro: I think that the extracts from that big envelope should be called 4-A, B, C, and so forth.

Mr. Milledge: That's already in as 4-C.

Mr. Shapiro: Oh, that's already in as 4-C?

Mr. Devaney: That's already in as 4-C.

By Mr. Devaney:

Q. Now, you have a copy of the agreement, have

434 you, Mr. Wyckoff? A. Yes, I have.

Q. Now, if you will turn to Rule 2 on page 15, under Rule 2, Mr. Wyckoff, what was the practice with regard to the payment of the lunch period when shifts were worked at a particular location such as New Smyrna? A. Well, where we had three shifts, the 20 minutes to eat were included in the hours of assignment; in other words, the hours for which we paid.

Q. Well, did this depend upon a particular job or did it apply to all the shop crafts at a particular location? A. It applied at the location, not to a particular job.

Q. In other words, the example that I asked Mr. Cooke about and he cited the rip track as being only on one shift, this was not excluded because the practice was to pay if shift work were performed by any of the crafts at that location, namely, New Smyrna; is that correct? A. That's right. The location as a whole would be considered as to whether it was on three shifts, two shifts, or one.

The Court: Well, what you are saying is that the rip—with the rip track on one and the crafts in the shop
435 on three, that you bulletined the same hours for the single shift that you did for the three shifts?

The Witness: That's correct, sir. The three shifts determining the requirement with respect to the meal period.

The Court: The three shifts would determine?

The Witness: That's right, sir.

By Mr. Devaney:

Q. And it has also determined whether or not you paid for the meal period? A. That is correct.

Q. Now, with respect to the operation at New Smyrna at the present time, have the hours which were shown in the bulletin issued in November of 1964, have those been the hours followed for some period of time? A. Yes, since we began hiring after the strike began.

Mr. Milledge: And I object. I think it would be irrelevant as to what has been done under an illegal arrangement, now decided, determined to be illegal. I object to the question and the answer.

436 The Court: Well, I'm going to let it go in the record. It's the way they have handled it since they started up operations.

Mr. Devaney: Would you mark this for idetnification.

The Clerk: LL.

(The referenced material was marked Defendant's Identification Exhibit LL.)

By Mr. Devaney:

Q. Mr. Wyckoff, I hand you a document marked for identification as Defendant's Exhibit LL.

Will you tell me what this consists of? A. It's a letter from Mr. Cooke, dated July 7, 1962, to me; and my response of July 16, 1962, to Mr. Cooke.

Q. Now, without going into the details at all, what was the general nature of Mr. Cooke's letter and your response? What subject matter did it cover? A. Mr. Cooke requested that we increase rates of pay and, in accordance with what he contended to be the requirements of Rule 46, and I responded denying it.

Q. Well, that's all we wanted to know, just for identification. It was his request under Rule 46? A. That's correct.

437 Mr. Devaney: I move that Defendant's Exhibit LL be received in evidence.

Mr. Milledge: The Intervenors have no objection.

Mr. Shapiro: The Government has none.

The Court: Mr. Wyckoff, this is a matter about which Mr. Cooke was questioned on cross yesterday by Mr. Devaney?

The Witness: Yes, sir.

The Court: And he said that he did make a complaint, but he let it die on the vine; he didn't process it to a conclusion then?

The Witness: That's right. It became barred by the time limit provision of the agreement.

The Court: He did nothing about it?

The Witness: That's right.

438 The Court: In other words, this exchange of letters is all your file shows was ever done about it?

The Witness: That's correct, yes.

The Court: It was dropped after that?

The Witness: Yes, sir. He permitted—

The Court: After this exchange of letters?

The Witness: Yes, he permitted it to become barred under the time limits provision of the agreement.

The Court: Yes, sir.

By Mr. Devaney:

Q. Mr. Wyckoff, I hand you Defendant's Exhibit—

The Court: In other words, your testimony is that, as

far as that's concerned, it corroborates his?

The Witness: That's correct, sir.

(Defendant's Identification Exhibit LL was received and filed in evidence.)

439 By Mr. Devaney:

Q. —Defendant's Exhibit LL. Would you look at that and tell me what was the claim presented by Mr. Cooke? A. Well, Mr. Cooke requested:

"Since all of the railroads of the Southeastern group except Florida East Coast Railway Company have applied the increases in wages provided for in the June 5, 1962 Chicago agreement, it appears to us there should be no further need for conferences with Carrier on this item. It has now become a simple matter of compliance on the part of the Florida East Coast Railway Company with the provisions of Rule 46(a) of the Federated Agreement, which reads as follows:"

And then he quotes it.

Q. Now, this letter was dated July 7, 1962? A. That is correct.

Q. And you responded on July 16, 1962. And what was your position at that time, Mr. Wyckoff? A. I told
440 Cooke that a review of the average hourly earnings in the Southeastern Territory of employees in outside industry as well as those on other railroads fails to lend any support to his request, and therefore there was no change to be made in the decision that I had previously rendered in my letter of September 29, '61, with respect to his request for a wage increase.

Q. Now, following this, Mr. Wyckoff, were there any further steps taken with regard to the subject matter of the Union's request which refers to the increases given or provided for in the June 5, 1962 Chicago Agreement? A. No, sir. As Mr. Cooke said yesterday, he permitted that

issue to become barred by the time limitation provision of the agreement.

Q. Now, does this reference to the June 5, 1962 Chicago Agreement in turn refer to a Section 6 Notice that the Unions had given to Florida East Coast? A. Yes, it does, the original demand was for 25 cents an hour and it was disposed of by that national agreement with respect to other railroads.

Q. Now, after your response of July the 16th, 1962, did negotiations on the Unions' Section 6 Notice occur? A. Yes. We have had negotiations even after the strike began.

Q. And after the negotiations—were the negotia-
441 tions themselves followed by mediation? A. Yes, we've had mediation.

Q. And upon the release of the dispute by the Mediation Board, the strike took place; isn't that correct? A. That is correct.

Q. And after the strike, was there ultimately an Emergency Board in that case? A. Yes, there was, almost a year later.

Q. Now, did all of these procedures, the negotiations, Mediation Board, the Emergency Board, all rate to the Section 6 Notice that the Union had given? A. That's correct.

Q. And Mr. Cooke's letter related to the same Notice, demanding that you put into effect under Rule 46 the agreement reached by other railroads; is that correct? A. That is correct.

Q. Now, Mr. Wyckoff, have you at my request made any search of the files of the Florida East Coast to determine whether there had been any prior settlement, under Rule 46, of any nature? A. Yes, I have.

Q. And what were you able to ascertain from your files with regard to matters under Rule 46? A. I found
442 that there was one case progressed under Rule 46, and it ultimately went to the National Railroad Ad-

justment Board and was disposed of by the Second Division in Award 1182, if I recall the number correctly.

Q. Now, what did that matter involve, Mr. Wyckoff? A. It involved the manner in which fractional cents would be applied to the wage increase.

Q. And which provision of the agreement is that? Do you still have the Shop Craft Agreement before you? A. Yes. It's Paragraph (b) of the Rule.

Q. And would you for the record read that, so that we will have that firmly fixed? A. Paragraph (b) provides:

"In fixing the rates of pay, when increases or decreases are made, amounts under one-half (½) cent will accrue to the benefit of the Railway, and amounts one-half (½) cent and over, will accrue to the benefit of the Employees."

Q. And that provision has no relation to the portion of Rule 46(a) which refers to the Southeastern Territory? A. That is correct.

Q. Now, from your files, did you find any other record of an interpretation or application of 46(a) of the
443 agreement? A. No, I did not.

Q. Now, have you taken any other action? I believe Mr. Cooke said that this was handled by—what was the Department previously called that handled this? The Motive Power? A. It was the Mechanical Department.

Q. Now, have you taken any other steps to ascertain whether they have any record of any such settlement? A. Yes, I checked with Mr. Matthews, who is a Special Assistant to the Chief Mechanical Officer, the head of the department. He has been with the department for almost 40 years and he told me, to his knowledge, there had been no such increase.

The Court: I'm sorry. I have lost something here, Mr. Devaney. No such increase as what?

Mr. Devaney: I'm sorry. No such increase? I believe—

The Court: That's the witness' answer. I'm not quite sure what he means.

Mr. Devaney: We are referring to the provision—

444 The Court: If I'm going to take hearsay from Mr. Matthews, I want to know what it is I'm getting.

Mr. Devaney: Well, let me clarify it by asking the witness.

The Court: Yes, sir, that's what I want.

By Mr. Devaney:

Q. Now, specifically, Mr. Wyckoff, what did you inquire of Mr. Matthews about? A. Mr. Cooke yesterday referred to a two cents increase to helpers, as I recall it, based upon rates of pay that he said were being paid to the Atlantic Coast Line. And in checking with Mr. Matthews, as I said a minute ago, he told me that to his knowledge there was no such increase.

Q. And you have checked your files and did you find any record of any such increase? A. No. In fact, I checked back in the history of wage increases in the Mechanical Department as far as 1917.

Q. It would be safe to say that, if this matter exists, you have been unable to find any record of it? A. That's correct.

Q. Now, in the time you have been with the Florida East Coast, Mr. Wyckoff, has there been any occasion on which you have handled, other than this one claim pre-

445 sented by Mr. Cooke in 1962, any claim by any of the shop crafts that Floriad East Coast was required to pay wages paid by other railroads? A. No, I have not.

Mr. Devaney: I would like to mark this for identification as—

The Clerk: MM.

(The referenced material was marked Defendant's Identification Exhibit MM.)

Mr. Devaney: And this marked as NN.

(The referenced material was marked Defendant's Identification Exhibit NN.)

By Mr. Devaney:

Q. Mr. Wyckoff, I hand you the document marked for identification as Defendant's Exhibit MM. Without going into any of the content, would you simply tell me for identification what that is? A. It's a photographic copy of a newspaper clipping from the Florida Times-Union, dated August 15, 1964.

Q. Now—

The Court: '64?

446 The Witness: Yes, sir.

By Mr. Devaney:

Q. Now, does that newspaper clipping contain a picture and the name of any representative of the Carmen's Union? A. Yes, Mr. Katsikos, who I understand is Secretary and Treasurer of the Carmen's organization.

Q. Now, I hand you the document marked for identification as Defendant's Exhibit NN, and for identification, would you tell me what that document is? A. That is a photographic copy of a newspaper clipping from the Florida Times-Union, dated July 21, 1964.

Q. And does it contain what is purported to be a quotation from the testimony of the same representative of the Carmen's Union? A. It's a reference to a letter which he had written, yes.

Q. Now, was this person a member of the Committee which Mr. Cooke referred to as having to approve, under Rule 2, any change in hours? A. It's my understanding that he was, as Recording Secretary of the Local.

447 Mr. Devaney: I move that Defendant's Exhibits MM and NN be received in evidence.

Mr. Shapiro: I object, Your Honor. The newspaper clipping is not the proper way to bring forth facts which are referred to in them. It's nothing but a hearsay form.

Furthermore, I don't see that these matters have anything to do with the matters in issue.

Perhaps Mr. Milledge would like to look at them.

Mr. Milledge: The Intervenors join. I'm sure I know what they are.

Your Honor, I might point out just one other thing: Mr. Katsikos lives in Miami, Florida. Mr. Wyckoff has already told the Court that, in Miami, Florida, in Hialeah, where any Committee might work to approve starting times, the starting times are the same as they were before and the 20 minutes has been granted.

The issue which has been raised pertains to New Smyrna, where obviously Mr. Katsikos, as Recording Secretary of the Local Union in Miami, would have no
448 jurisdiction.

And further the objection on the basis of relevancy.

Mr. Devaney: Your Honor, if I may make a brief comment before you rule.

In the first place, Mr. Milledge's assertion that we are concerned here with what has occurred at one point, I think is not well taken. We are concerned with the provision of the agreement itself and whether the alleged violation of the agreement occurs in New Smyrna or at some other point, we are concerned with what the Carrier is required to do under strike conditions with respect to a provision that requires approval of the Union which is on strike, and which the General Chairman of that Union and President of System Federation 69 has testified that approval would not be given in any event.

Now, this does not represent a change in the rate of pay that people formerly were getting or the denial of a paid meal period, which they would otherwise be provided. And I think that this newspaper clipping of July 21st, marked for identification as Defendant's Exhibit NN, con-
449 tains a direct quotation from a letter which Mr. Katsikos had written. Mr. Katsikos was an official, Recording Secretary of Local 555, and as an official of that Union, I believe that it does bear on showing the intent of at least one member of that Union concerning the conflicts between the Union and the Railroad during this strike condition.

Now, that is the purpose that it is offered. Mr. Cooke has already testified that, because of the strike, he would not have been in favor of approving any change in hours.

Mr. Milledge: Your Honor, that's quite a misrepresentation of the testimony.

The Court: I recall the testimony.

Mr. Devaney: So I think it is material and relevant, simply to show further this basic division. As Mr. Katsikos has put it, he has indicated that this is in terms of a conflict between the Union and the Company; and this is the sole purpose for which this is offered. And for that purpose, we feel that it is material and relevant.

450 The Court: Conceding its competency, which is, it seems to me, a rather violent concession, I don't see any materiality or relevancy. What you understand is that Katsikos is a member of the Local Committee at Miami; is that right?

The Witness: Yes, sir. I understand that.

By Mr. Devaney:

Q. Mr. Wyckoff, did Mr. Cooke, as General Chairman of the Brotherhood of Railway Carmen, receive copies of the bulletins issued after you began operations on February—or in advance of your beginning of operations on February 3rd, 1963? A. We mailed them to him. I assume he did.

Q. Did he acknowledge or write you indicating that he had received such bulletins? A. He acknowledged—he wrote protesting advertising of jobs, saying that his people were on strike.

The Court: If there is an objection, I'll strike that statement.

Mr. Milledge: Pardon?

451 The Court: If there is an objection, I'll strike that statement.

Mr. Milledge: We object.

The Court: The answer is striken. If you've got letters from Mr. Cooke, why, let's see what the letters say, not what this witness relates them as saying.

Mr. Devaney: I thought I had the letter there, Your Honor. I don't have Mr. Cooke's letter at the moment. If I can locate a copy of it, I'll offer it in just a moment.

By Mr. Devaney:

Q. Mr. Wyckoff, I hand you this document and ask: Is that the same decision of the Adjustment Board that you referred to earlier? A. Yes.

Mr. Devaney: Your Honor, we can either mark it as an exhibit or I'll simply submit a copy of the Award. And this is Award 1182, Docket 1107 of the National Railroad Adjustment Board, Second Division, and the date
452 of it is May 13, 1947.

The Court: Well, that's the case—what was referred to as the one case they have had—

Mr. Devaney: That's correct, Your Honor, that involved—

The Court: Rule 46(b).

Mr. Devaney: —Rule 46, Your Honor.

Mr. Milledge: And we have been told—

The Court: Rule 46(b), which neither side contends has anything to do with it.

Mr. Milledge: That's right.

Mr. Devaney: Your Honor—

The Court: 46(a), as I understand it, is the—

Mr. Devaney: That is correct, but what we have said, Your Honor, is that the search of the—

453 The Court: This is a decision that a half-cent and under goes to the Railroad and a half-cent and over goes to the man?

Mr. Devaney: That's Correct. And what we have—

The Court: It doesn't bear on this controversy in any way does it?

Mr. Devaney: Mr. Wyckoff has searched the files, however, with regard to all matters which would relate to Rule 46.

The Court: Well, I had his testimony, uncontradicted as yet, that he can find no decision bearing on 46(a).

Mr. Devaney: That's correct, Your Honor; the only one being the 1962 claim filed by Mr. Cooke.

The Court: I'm going to take his word for it. I don't want this, unless you insist on putting it in.

Mr. Devaney: I simply—if you want it, it's here
454 and available.

The Court: I've got an office full of papers in there I don't have time to read.

Mr. Devaney: No further questions, Your Honor.

Mr. Shapiro: I have no questions.

Cross Examination

By Mr. Milledge:

Q. Is it your testimony on this 46, Rule 46(a), that there has been no increase over the years in wages based upon an interpretation of 46(a)? A. I have checked the records and I can find no such increase. And I say, as I said, I also checked with Mr. Matthews of the Mechanical Department.

Q. How about when—was Mr. R. B. Hunt the head of your Mechanical Department at one time? A. Yes, he was.

Q. During what period of time? A. I can't answer it; it has been a number of years ago.

Q. And of course many disputes do get settled on
455 the property; do they not? A. Well, certainly they get settled, but there are records of the negotiations.

Q. And you find no records of such negotiations in which helpers' pay was raised two cents by Mr.—in negotiations with Mr. R. B. Hunt, settled on the property? A. That's right. And in checking the scale of rates, I find no two cents an hour increase.

Q. All right. And you have checked the records thoroughly? A. I checked the records I have available, yes.

The Court: Well now, what does that mean? What you've got in your hip pocket or what?

The Witness: That are available in the office, Your Honor.

The Court: All right.

By Mr. Milledge:

Q. Now, during the last ten years, up until 1962, this Railroad has been a part of the Southeastern Carriers Conference Committee, has it not? A. It has joined voluntarily the Southeastern Carriers Conference Committee in the individual—

456 The Court: That's the only way it could join.

The Witness: Sir?

The Court: You have been a member—the only way you could join would be voluntarily. Nobody put a gun on you to get you in there.

The Witness: Yes, sir, but—

The Court: You have been a member since 1962.

The Witness: But there's a Committee set up for each separate demand, Your Honor, and each time there is a decision made whether to join or not to join.

The Court: Excuse me. You've already answered.

By Mr. Milledge:

Q. So you have been a member and you have been paying the same rates as other railroads in the Southeastern Conference, up until '62? A. But when you say "a member", it's not a continuing arrangement. If—

457 Q. We are not contesting your right to withdraw. I'm just asking you if you've been a member up until the end of '62? A. To my knowledge, the Carrier has participated in most of them, yes.

Q. And you paid the same rate for shop crafts as all the other Southern railroads during—since the second World War, up to 1962? A. Yes. Any increases that come out of those national negotiations, we paid where we were a member of them.

Q. So you have been paying the same as the Southeastern Territory up until 1962, when you had, when you pulled out of national handling and had this separate dispute? A. We've been paying the same as Southeastern railroads, not Southeastern Territory, which includes outside industry.

Q. Now, you do acknowledge that the Rule 2 does require you or some other person in FEC management to negotiate shifts under the System Federation 69 contract? A. It provides that you will handle with the Local Committees.

Q. All right. And you didn't do that when you bulletined these jobs in November of this Year? A. No, because the Local Committee—

458 Q. Well, you didn't? A. —since the strike—

The Court: Just answer the question, please.

By Mr. Milledge:

Q. You did or you didn't? A. Not in November, no.

Q. No. And did you invite them to negotiate these changes in time? A. No, because of our experience since the strike began, they refused to come in.

Q. You didn't invite them; you didn't send a letter; you didn't ask them to negotiate this? A. We have invited them on prior occasions and they didn't come in.

Q. Now, how many shifts are you running at the present time at Bowden? A. Two.

Q. And are you paying for the lunch period at Bowden? A. Yes, we are.

Q. So Bowden is a situation in which you have less than three shifts and you are bulletining them 8 hour shifts with a 20 minute lunch period? A. Because of the re-

459 quirements of the service at Bowden, that's right.

Q. So your interpretation of the contract, saying that you have a free hand any time you have less than three shifts to abolish the lunch period, is, even in present practice, is not what you follow? A. Well, no, I don't agree with that statement at all.

Q. Well, you did admit that you have less than three shifts at Bowden at the present time and you pay for the lunch period; you admit that? A. Yes, because—

Q. All right. A. It's an originating terminal and we have to have men on to inspect the trains as they leave or arrive.

Q. And of course, I'm speaking of men covered by—we are speaking of men covered by System Federation 69 agreement? A. That's correct.

Q. Yes. All right.

Mr. Milledge: That's all we have, Your Honor.

The Court: Redirect examination?

Mr. Devaney: Yes, sir.

460 Redirect Examination

By Mr. Devaney:

Q. What was the practice, Mr. Wyckoff, with respect to the payment prior to the strike of the meal period for employees who were required to perform continuous service? A. I'm not sure I understand the question but, where we had three shifts, continuous service around the clock, we paid for the meal period.

Q. Well, what about places where you may or may not have had the three shifts but where the individual was required to remain on duty on a continuous duty, what was the practice with respect to the payment for the meal period? A. Well, if we required them to remain on continuous duty, we paid them for the meal period. But we had other points such as Miller Shops where they were not required to remain on continuous duty.

Q. Now, is the reference in Rule 45, that is on page number 48, is this reference related to individuals who are required to ramain on duty although the operation may not be on a three-shift basis? A. Rule 45 has reference to intermittent service and provides that eight hours work, exclusive of the meal period, shall constitute a day's work.

Q. What does "intermittent service", what does
461 this mean? A. Where an individual doesn't work continuously; in other words, his assigned hours are split up.

Q. Well, what about the last part that says that limitation, this provides:

"For those whose duties do not require continuous service".

What does that refer to? A. That means where you split the shift, where he doesn't have to stay on continuously for eight hours.

Q. Now, what was the practice prior to the strike, Mr. Wyckoff, at Bowden and other originating terminals where people were required to be on duty? Did you pay for the lunch period? A. Yes, we kept them on continuous.

Q. And you paid the lunch period? A. That's correct.

Q. And that is the practice you now follow? A. That's correct.

Q. Now, what is the nature of the work at New Smyrna? A. Well, New Smyrna is basically a major repair facility.

Q. Now, what was the nature of the work at Miller Shops prior to the strike? A. It was—well, we had
462 several types of work but it was a major repair facility prior to the strike.

Q. Now, at Miller Shops, were the people required to remain on duty because of the movement of trains? A. No, they were not.

Q. Are they required to be on duty at New Smyrna now because of the arrival or departure of trains? A. No, they are not.

Mr. Devaney: No further questions.

Recross Examination

By Mr. Milledge:

Q. The pre-strike situation at Miller Shops was negotiated with the relevant Committee; wasn't it? A. I can't answer that. I don't know.

Q. And as a matter of fact, it provided for a one hour lunch period? A. The bulletins have thirty minutes meal periods.

Q. Well anyway, you have no reason to doubt that it was negotiated, just like it was supposed to be under the

contract? A. You are saying it; I have no way of knowing. I didn't negotiate it.

463 Q. All right. Now, this Rule that you just mentioned, Rule 45, talks about intermittent service at outlying points? A. That's correct.

Q. That doesn't mean Bowden, New Smyrna, Hialeah, or any of those places, does it? A. No, outlying points.

Q. Yes.

All right, the bulletins that were introduced here a little while back about New Smyrna, they don't show that people go off duty, do they? They just show that they are on from 8:00 o'clock in the morning until 4:30 in the afternoon? They show them on duty from 8:00 o'clock until 4:30, don't they? A. I believe they show assigned meal period, thirty minutes.

Q. They are quite different from the Miller Shops?

Mr. Devaney: You are referring to New Smyrna and I don't believe I'm aware of what you are referring to.

Mr. Milledge: No, excuse me.

Mr. Devaney: These happen to involve Miller Shops, at New Smyrna.

By Mr. Milledge:

464 Q. The ones that are marked Plaintiff's Exhibit— or Intervenors' Exhibit 1, New Smyrna Beach, Florida, show on duty from 8:30 until 4:30 p.m., less 30 minutes meal period? A. That's what I said, yes.

Q. Yes.

It doesn't show them off duty during that 8½ hour period. A. Well, it shows that they get a 30-minute meal period.

Q. Now, the Millner Shops bulletins—the negotiated prestrike bulletins, showed them being off duty during the period of time; did they not? A. No.

It said working hours 7:00 to 12.00 and 12:30 to 3:30.

Q. Yes. A. So obviously the thirty minutes was the meal period.

Mr. Milledge: That's all we have.

Mr. Devaney: Nothing further, Your Honor.
465 The Court: Come down.

(Witness excused)

Mr. Devaney: That was the only witness we intended to offer at this time, Your Honor.

The Court: All sides have closed their evidence?

Mr. Milledge: Yes, Your Honor.

The Court: All right.

You may proceed.

466 Argument by Mr. Devaney

Mr. Devaney:

This case involves, of course, the Application of the Defendant for the approval of employment practices, which is made pursuant to the provision of the Order of the Court of October 30.

The hearing has demonstrated quite clearly, I believe, that since the Carrier resumed operations on February 3rd, 1963, that it has followed a program of hiring and training of employees as rapidly as it had people with qualifications available to them and who were willing to come to work. This program has not diminished insofar as the Carrier's desires are concerned, since the resumption of operation on February 3rd.

It is significant to note, however, that the number of applicants who have come to the Railroad making application or who have been recruited by the Railroad has varied widely, and since February of this year have fallen overall quite precipitously.

Now, the exhibit which we introduced, our Exhibit H, on which we showed the total number of applicants for 1963, was 2,035. For 1964, for the ten months through
467 October, there had only been 1,122 applicants.

Now, Florida East Coast hired, of the non-operating crafts, 542 individuals in the calendar year 1963, and in the first ten months of 1964 hired 308. And I believe

that the testimony indicates that there has been a further increase of some five to eight people since November, during the month of November, so that the total hired in 1964 would be somewhere in the neighborhood of 313, or fifteen persons.

Now, the total number hired since the strike began in '63 and '64 of 850 non-operating employees has necessitated the training of these people, since it is clear that the Carrier was unable in the main to obtain fully qualified journeymen for the jobs that it had available. Indeed, this was conceded by the United States in the opening stages of this case, in which it stated very candidly that it conceded that the Florida East Coast had not been able to hire journeymen because the Unions had not been willing to supply or permit their members to work. And that, in the Railroad parlance in the main, this is what "journeyman" means.

468 Now, in addition, the evidence fully shows that the training of people for many of the positions involved procedures and techniques which are unique to the Railroad industry. By that, I mean that many of the jobs, indeed most of the jobs, be they essentially accounting or shop craft jobs, involve special training unique to the Railroad industry. And for this reason, it is necessary to train these people in the procedures of the Railroad industry; that this training period is a long one is fully demonstrated by the provisions of the Shop Craft Agreement showing that the normal apprenticeship period is four years. While the Clerks Agreement and others do not have apprenticeship provisions per se, the testimony and the evidence makes it perfectly clear that a considerable period of time is required to train people for many of the more skilled jobs.

The evidence shows that in the initial stages of the strike during the first ten months of 1963, that a considerable number of employees were hired, employees who possessed the less skilled qualifications and people who could be used

on an interim temporary basis and who are now and
469 were then still in the process of training to become the fully qualified individuals who handle the various jobs.

Now, this has ranged from the shop crafts, where people have been hired with as much ability as we can locate people and where they have been slotted into the training program in accordance with their past experience and abilities, to the clerks who have been placed in training for various jobs, including such jobs as rate and division clerks, to the training of people in each of the departments.

Now, in our earlier appearance in making an estimate of the number of employees which would be required to comply with the prior agreements, having no better standard than taking the number of people in those crafts prior to the strike and the number that we had at the time, the figure of 600 came in as the estimated number of additional people who would be required to comply with the old agreements.

Now, we have shown here, upon an analysis and study of each department, that what the actual additional requirements are to comply fully with the existing agreements of the non-operating Unions. Now, we went through department by department and have shown why the
470 number of people required before the strike has been reduced.

Now, this is a total figure of 317 people. We showed, for example, that in the Mechanical Department, that the reduction of 82 had come about primarily as a result of not performing the AER, that is, interline optional repairs. This means, Your Honor, that on cars belonging to other roads, there are many repairs which are mandatory and must be performed and those are being performed. The others are these optional repairs which any individual carrier may make or may not make. It has resulted in part from the discontinuance of the bearing manufacturing, which discontinuance occurred prior to the strike.

It has occurred in part because the Fruit Growers Express is performing their own repair work and sending cars directly to us from their shops.

We have shown in the Maintenance of Way Department that 112 employees previously required are not now required because of the addition of new aquipment, and this was enumerated, including the Caterpillar front end loader with winch to unload switches and turnouts as units. This one unit will do, with four men in three hours, what
471 formerly required twelve men a period of three days.

The track lining equipemnt now does with an operator and a laborer what previously required eight to ten men.

The tie cars have on them an unloading device which unloads the ties. This previously required a crew of ten to twelve men to throw the ties out of the cars.

The surfacing work, the "hi-rail" cars which are now radio dispatched, fully equipped, containing a great variety of machinery and equipment.

And all of these have added up to the fact that the Maintenance of Way can be performed with some 112 fewer people than was previously required.

Now, there is only one category in this Department, Your Honor, where work is not being performed that was previously performed and that is one bridge gang. This work is being contracted and is not, in fact, being performed by employees of the Florida East Coast; so there is no violation as to the payment of their wage rate.

We have also shown that, where the Carrier does not have sufficient qualified personnel, it always has had the right to contract out the work; that we have brought this
472 question into the proceeding to demonstrate that we are of necessity having to contract out work where we do not have the qualified personnel. And we wanted to make it clear that the practice existed so that there could not later be the contention that we were not complying with the agreement.

Now, in the Signal Department, 35 less people are required, primarily because of the elimination of this 4400-volt line, which in turn made unnecessary transformers which were a source of considerable maintenance attention, relays, substations, and so forth.

In addition, the CTC has reduced the number of signals, has reduced the number of insulated joints. And the Microwave signals are now transmitted through the rail; all of which has reduced the amount of maintenance that we had.

And the Signal Department, as was true in the Maintenance of Way Department, the installation of CTC has been contracted out for the reason that we do not have sufficient qualified personnel to perform this work.

And in the Transportation Department, 67 less
473 people were required, chiefly because of the situation on the LCL freight.

Now, as we have shown, while LCL freight has been handled since the strike on a permit basis, since the beginning of the strike we have been able to handle, even on a permit basis, only by having the consignee or consignor loading or unloading its cars. Now, on a permit basis, Florida East Coast is actually handling as much, indeed more, LCL freight than other railroads, not only in this area but throughout the country, are presently handling in the main.

Furthermore, we have amended our tariff to comply with the provision on LCL freight, which the Seaboard already has in operation.

Now, the Accounting Department has 10 less people required because of the expansion of the machine accounting to other records which were not previously handled by machine accounting, and by the elimination of certain reports which we have found to be unnecessary in view of this availability of other information on the machine accounting records.

In the Freight Traffic Department, 2 less people
474 are required as a direct result of use of the Zerox machine to copy the various correspondence and to reduce the amount of typing and collating of material which has previously been done. And also the use in the Freight Traffic Department of machine accounting records which are essentially made for use by the Transportation Department.

Now, in the Personnel Department, there actually has been an increase of one person over what the Department had prior to the strike and there is a further need for one additional person, and this job has not been filled.

Now, with these requirements, the Carrier bulletined the number of jobs immediately required which were 114, and between November 2nd and November 3rd, it bulletined 114 additional jobs. Now, we received from those on strike a total of three bids. Only one person, in fact, reported for work. Now, of the other 113 positions, we received bids only from people who were already working, and this in no way represented an increase in the total number of persons required to permit the Carrier to comply fully with the agreements.

Now, we have, as of November 13, reinstated
475 all the provisions of the non-operating Union agreements as to wages, hours, job descriptions, and so forth, as was illustrated by Defendant's Exhibit JJ.

Now, this is a copy of one of the Notices sent to one individual and similar notices were sent to each other individual where a change in rate or hours or in job description in anyway was involved; so that the individual was informed of the change to comply with the provisions of the prior agreement.

Now, the assertion has been made that the meal period and the starting time for the shop crafts is not in accord with the provisions of the Shop Craft Agreement.

Now, as Rule 2 of the Shop Craft Agreement shows, and this is Plaintiff's Exhibit 4C, on page number 15, Rule

2(a) provides that there may be one, two or three shifts employed. It then says that the starting time on any shift shall be arranged by agreement between the Local officers and the employees committee, based on actual service requirements.

Rule 2(b) provides that:

"The time and length of the lunch period shall be subject to agreement, preferably within the limits of the
476 fifth hour, except where three shifts are employed, when the lunch period shall be 20 minutes without loss of time."

Now, in support of this, Mr. Cooke stated that, prior to the strike, at New Smyrna Beach the lunch period was 20 minutes and that this was paid for. Mr. Cooke admitted, however, that three shifts were not operated at New Smyrna. It has been shown that there are only two shifts being operated at New Smyrna at the present time. And it has further been shown that the miller shops, prior to the strike, which was another repair facility which the Defendant operated, it, prior to the strike, was operating only one shift at Miller shops and it paid the employees only for the time worked and not for the meal period; and further, the bulletins show that the lunch period was 30 minutes.

Now, in conformance with the provisions of the agreement, the Defendant has since the resumption of operations operated these hours at New Smyrna since February of 1963. Now, to the extent that agreement is required under the provisions of Rule 2 of the Shop Craft Agreement, I respectfully request that, if this has not already by implication become a part of our Application, our
477 Application be amended to include a request for exemption during the period of this strike for the compliance with any provision such as Rule 2 that requires the agreement between the employer and the Union on such a matter as the change in starting time.

Now, it is clear from the testimony here, Your Honor, that because the shop crafts are on strike that the concept of making a request that they agree to a change in hours would certainly not be well received. And this is frankly admitted by Mr. Cooke, who said that he did not believe that he would have agreed to any such request.

Now, the provisions, the whole intent, the whole purpose of the agreement is to provide for the requirements of the service. And this, of course, is recognized in Rule 2, which says:

"Based on actual service requirements."

Now, this is the reason for the necessity of operating the hours that we have since the resumption of operations. The actual hours must conform to the requirements of the service. That is all that has been done, and because
478 there has been no conceivable prejudice in any way to the rights of any person, they have not been deprived of the meal period that they are entitled to under the contract, then we feel that we are already in compliance with the agreement by operating in the way that we have operated.

Now, the assertion has also been made that the placing of new employees in a training program, that is, the apprentice program, in accordance with their experience, is not in accord with the agreement.

Now, first, Your Honor, let me say that I don't believe that any of us could or would contend that this agreement was negotiated with the idea that we were going to be faced with a strike. I don't believe that the provisions of this agreement were intended to be read except in the context of the shop crafts working and continuing to work. It was not—the agreement was not written with the idea that the shop crafts were not going to perform service.

Now, we begin with this, I believe, as the basic assumption: What do you do when an unforeseen contingency comes into being that the parties themselves did not
479 provide for in their agreement?

And we believe that the manner in which the Railroad has operated with respect to the placing of new employees into this training program, in accordance with their experience and ability, is entirely in accord with the agreement.

In the first place, there is no provision, as Mr. Cooke has admitted, which prohibits the Carrier hiring men with experience and placing them into the proper slot of the apprenticeship program. And we concede that there is no provision which specifically authorizes this to be done.

Now, that there is some recognition that, even when the shop crafts were working, there were times when this had to be done is also demonstrated by the provision which was negotiated, which appears on page 84 of the agreement, the memorandum of March 4, 1942.

Now, this was a provision negotiated during World War II when there was a shortage of personnel and under this provision, when again the shop crafts were operating but despite the fact that they were working there was this shortage of personnel, and in this agreement pro-
480 vision was made for the advancement of apprentices.

Now, in keeping with this over-all problem that the Carrier faces, this is really all that has been done: Florida East Coast has not gone out and hired people with no prior railroad experience and brought them in and said, "We are going to qualify you and give you any benefits as a journeyman." We recognize that these people are not so qualified and we have had to continue their training for some period of time, depending upon their prior experience and their abilities. This is what has been done. They have been placed in this training program where their experience and ability would justify placing them and when, and only when and if, they have by additional experience with the Railroad attained the additional qualification and experience necessary to be advanced to the journeyman status, have they been so advanced.

We believe that this is fully in accord with the provisions and the intent of the agreement as to how the over-all apprenticeship or training program is to operate, recognizing as we do, Your Honor, that the agreement was never written with the express idea that there was
481 going to be a strike and a refusal on the part of any of these Unions to perform service over an extended period of time.

And finally, we believe that the strike conditions under which we are operating necessitate our operating in precisely the way that we have. It is the only way that we can find employees, namely, by taking those with as much training, skill and experience as we can find, utilizing their abilities and training them at the same time so that they can ultimately perform all of the jobs, all of the skills that are required of their jobs.

Now, Your Honor, the assertion has also been made that, under Rule 46(a), Florida East Coast is required to pay some different rate of pay because other railroads are paying rates higher than the Florida East Coast.

Now, we believe, on the surface, Your Honor, that this at best involves an interpretation and application of the contract, and that this matter should not properly be before the Court, since it is a matter of interpretation and application of an agreement which is within the exclusive jurisdiction of the Railway Adjustment Board. But if the Court does not agree with this point and feels that
482 the question must be decided, we think there can be no doubt whatever that Mr. Cooke, in 1962, submitted a claim to the Florida East Coast involving the assertion that Florida East Coast was obligated under Rule 46(a) to make the same wage payments that had been agreed to in the national settlement in Chicago. This claim, and this involved, this was a claim for the over-all wage rates which had been agreed to in the national settlement—this claim was denied by the Carrier and the Union failed to take any further action as provided by the agree-

ment and the claim became barred; so that even if they had a claim, it has now become barred because of its presentation and the fact that the Union did not process it. And under the terms of the agreement, the claim has become a complete dead issue and may not be raised again in this proceeding.

Mr. Cooke has also made reference to asserted settlement—

The Court: What provision of the agreement are you referring to?

Mr. Devaney: 46(a), Your Honor.

483 The Court: I know, but what provision are you referring to as making it res judicata, so to speak?

Mr. Devaney: The provision of the agreement.

Mr. Milledge: I will be glad to be of assistance, if I can be of assistance to the Court, I will be happy to.

The Court: All right, sir. What is he referring to? Maybe you can help him.

Mr. Milledge: The retroactive part, the wage claims based upon Mr. Cooke's assertion of an increase that was due at that time. The time claims have to be made within 60 days or lost.

The Court: Yes, sir.

Mr. Milledge: So, for those people working during '62 who should have been paid more money during '62, they've lost their time claims by not pursuing them.

That's the only thing in the contract.

484 Mr. Devaney: Your Honor, the agreement to which I made reference is an agreement of August 21st, 1954. Mr. Wyckoff has advised me that this is not printed as a part of what has been introduced. It is not in this book. (Indicating)

Now, I do not know whether it's in one of the other documents which were introduced at the May hearing.

If I may, this is part of the—

The Court: Well, it would be pretty hard for it to be introduced in May when it came out in August.

Mr. Devaney: No, but—

The Court: It would seem to me.

Mr. Devaney: Mr. Shapiro said that all of the supplements to this agreement have been—or Mr. Milledge said that all supplements have been introduced. I do not know whether this supplement—

The Court: It wasn't in existence in May.

485 Mr. Devaney: I beg your pardon?

The Court: The agreement was entered in August. It wasn't in existence in May. It couldn't have been put in.

Mr. Devaney: August 21st, 1954, Your Honor, ten years ago.

The Court: I thought you said '64.

Mr. Devaney: No, Your Honor.

The Court: I'm sorry.

Mr. Devaney: It's ten years before.

The Court: Excuse the interruption. I thought you were talking about something this August.

Mr. Devaney: Now, if I may, I will be glad to have and I will show this to the Court at this time and we will be glad to have a copy made if it has not been made.

(Tendering instrument to the Court)

Now, at—there are two provisions of this agreement. One is as to filing of the claim, which Mr. Milledge

486 made reference to. And the other is the appeal from the claim after it's denied.

Now, Mr. Cooke's letter clearly constituted a claim by Mr. Cooke, which was denied on July 16th.

The Court: Excuse me. This thing, if it's not in these papers, ought to be. You agree with that, don't you?

Mr. Milledge: Yes; yes, Your Honor. If it is not, it ought to be.

The Court: If it isn't, it ought to be and I'm going to permit—I'll permit Mr. Devaney to supply it.

Mr. Devaney: Now, we have, the Carrier has made a search of its records, Your Honor, and we have found no

record of the settlement or adjustment which Mr. Cooke has referred to. And please understand that I am not asserting at this time that no such settlement ever existed, but only that we can find no record that there ever was such an adjustment, either from the records or from any adjustment in the wage rates.

We further find that the only adjustment, or matter which has involved any part of Rule 46, was the
487 decision, the Adjustment Board decision in 1182 by the Second Division in 1947, which involved the provisions of 46(b). But that's the only case involving any part of Rule 46 that we have been able to locate from our records.

Now, whether or not this existed at one time, there certainly can be no doubt that the claim which was made in 1962 was denied for the reason that the provisions of Rule 46(a) did not obligate the Florida East Coast to pay the same rates that other railroads had paid; that this claim has been barred by the provisions of the agreement that I previously referred to, and copies of which will be supplied to the Court. And having permitted this claim to be barred, as Mr. Cooke has admitted he did by not taking a further appeal, it certainly could not be raised in this proceeding.

Now, what has the result of this hiring and training program been, insofar as the Florida East Coast is concerned?

Well, the record is very clear on this: It leaves not the slightest doubt that the Florida East Coast has, since it resumed operations, attempted to hire and train employees as rapidly as it could.

488 We are left today with an additional 114 people, if we are fully to comply with the provisions of the existing agreements. These positions are positions which, almost without exception, require a considerable amount of skill and training. And because we do not have the people who are fully qualified, we can continue to operate and handle the volume of traffic that we are presently carrying only by using the people that we have by crossing

craft lines and seniority districts to perform operations that these people are the only qualified people available to perform; by the continued use of our supervisory personnel, both exempt and non-exempt, to perform those limited functions that the people we do have are still not fully qualified to perform; that we must continue to contract out work where we do not have the qualified personnel to perform it with our own employees.

As I mentioned earlier, the work that we specifically made reference to as illustrating this problem was the bridge gang work which is contracted out, and the installation of CTC. Now, this represents the kind of work where we do not have the qualified personnel ourselves on
489 our own payroll to perform it and we have contracted it out.

Now finally, on the bridge tending, the Government has conceded that it believes the request in Paragraph No. 6 of our Application was reasonable and that it was not objected to.

Now, the Union has raised a question concerning the use of supervisory personnel or contract employees to perform this service. And we have shown, Your Honor, that these are critical points to the continued operation of the Railroad and, because they are sensitive points as part of the over-all security operation during the continuance of the strike, that this has been and is now being performed either by exempt supervisory people or is being contracted out as part of the over-all security program.

Now, we believe that because of the sensitivity of these positions that this must be continued. And we have shown that the attempts at sabotage have not stopped but have continued right up to the present time.

Now, there was an agreement at the outset of the hearing as to Pargraph No. 3, which was our request as to
490 the apprenticeship ratio and to the age limitation.

Now, those provisions are the provisions which I believe that all parties concede relate directly to the operation, continued operation, of the Florida East Coast.

Now, at the outset, there was a question as to whether or not the requests were sufficiently specific. There is no doubt from the evidence and the testimony as has been developed here that the problem of pinpointing any one supervisor and saying that he performed one operation or two operations which would involve scope work is simply not possible. This is an over-all problem where there are certain parts of the work in the training of these new employees who have not yet fully qualified, that the supervisors must not only, in the course of training, show these people by doing it but he must also perform those parts of the job that they are not qualified themselves to perform; and that in many areas, these people are the only people who are fully qualified to perform this operation.

We have shown that many of these operations are immediately critical to the continued operation of the Carrier.

491 Now, we have said and the evidence leaves no question but, if we cannot continue to operate in the manner set forth by crossing craft and seniority, the craft lines and seniority districts, and the use of our supervisory people to perform this, certain portions of this work, and so forth, that the operations of the Railroad would have to be severely curtailed to a minimum of 30 to 50% in the reduction of freight we are currently handling.

We believe that the showing here leaves no doubt whatever that the requests that we have made are reasonable requests.

Now, we have further shown, Your Honor, that the suggestion of the United States that there be a time limitation of four or five weeks is completely and impossible to comply with for the simple reason that you cannot train people in any such period of time. We have been endeavoring to bring our force up to the point that we can provide the service since February of 1963 and, in training these people, the jobs that we now need, the 114 jobs almost exclu-

sively consist of jobs that do require extensive training periods. This is the skill that we are lacking and it simply cannot be provided in any such period of time. We
492 are endeavoring to do so. We have endeavored to do so since we resumed operations. We cannot do more than we have, namely, to hire and train as rapidly as our abilities permit us to do, and our ability to train people is directly limited to the number of individual supervisory employees available to train and to assist in the performance of part of this work.

Now, the other two matters, Your Honor, then, relate to the seniority rosters. And we have shown again the reason for the non-furnishing of the seniority rosters from the commencement of the strike was the harassment of employees, including the circulation of such lists of employees entitled "Scab List". And as Mr. Thornton testified, which were not limited only to the names of the employees working but even referred to their relatives. It was because of this activity that we felt there was no choice but to protect in some manner the names of the employees, to protect them from further harassment.

Now, the only limitation that we ask here or have in the past asked is that the use of the names of these individuals not be used for improper purposes.
493 Now, the Union has rather vociferously contended there is nothing on the seniority rosters but the names of people.

I think we are not so naive as to believe, if you want to find the address, you can use the telephone book; but more important in my judgment, Your Honor, is this, that we are merely asking that the names not be used for an improper purpose. This is not a question of not furnishing the names but merely that the Union be required to do only, what they say they are going to do anyway, namely, not misuse the information.

We believe that for this reason it is both reasonable and a necessary provision to insure that the employees are

not, because of providing of these lists, subjected to undue harrassment.

Now, the Union Shop question we have offered, Your Honor, to prove the discrimination that has occurred againt previous members. We have offered the application for membership since the hearing in May. We have offered to show the failure of the Unions to provide membership application forms. We have offered to show that, even where this information requested in the form of a questionnaire was given, there was still no membership application form or membership being forthcoming; that the only instance in which the application form had been supplied was by the IAM and when this was submitted, the individual was not admitted to membership.

494

Now, we again believe, Your Honor, that this is related to the conditions under which the Defendant is operating. We further believe that this is intended, in the opinion of the Fifth Circuit Court of Appeals in the Trainmen case, to be a matter which should be disposed of by provision making the Union Shop Agreement non-enforceable as to these new employees with respect to whom the discrimination clearly has been demonstrated, unless and until the Union in question is willing to offer membreship to these new employees.

We believe that this is a proper part of the request which we have made and does relate to the conditions under which the Carrier must operate. And as we have asserted before, this is not only a matter which relates to the rights of these employees but it is a matter which directly affects the monetary liability of the Carrier itself, for the reason that the Unions have already demonstrated that the approach will be to assert and to contend that these employees must be discharged because of the failure to make an application within a specified time after employment. And on this basis that the Carrier may be subjected to severe monetary claims which, even if we win all of them, we will certainly be put to the expense of de-

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fending before the Adjustment Board, and that, because of this, we feel that this is a reasonable portion of the Order to clarify at this time to prevent these disputes arising in the future.

In summary, Your Honor, because of the necessity for decreasing the service that we can provide to the public unless we are permitted in the limited instances involved in this request to continue to use employees across craft lines and seniority districts and to use supervisory personnel to perform certain work which they and they alone are qualified to perform, to continue to hire people with such qualifications as we can obtain and placing them into the training program into whatever slot their experience would warrant their being placed and advancing them upon
496 completion of the additional experience with the Railroad through the training program until they obtain the journeyman position and the concession which all parties have agreed to that the apprentice ratio and the age limitation should not be applicable during this period of strike conditions since we are unable to get fully qualified craft people; and the bridge tending, we believe, because it is totally critical to the operation of the Defendant, that we should be permitted as part of the over-all security to continue the present method of performing this work by supervisors or by contracting it out to security guards; and, finally, with respect to the seniority rosters and the Union Shop, that we be required to furnish the seniority rosters only for legitimate purposes and that the Order specify that those rosters not be used for any improper purpose, and that the Union security agreement be inoperable until such time as the Union which wishes to enforce it demonstrates that membership is available to the class of employees hired since the strike without discrimination.

The Court: Do you think that—does the bridge tender, your request with respect to bridge tenders, come
497 under No. 6 or No. 7, or both?

Mr. Devaney: It comes under No. 6, Your Honor, not under No. 7.

The Court: Well, what is it you want? Specifically what is it you want me to authorize under No. 7?

Mr. Devaney: Under No. 7, what we have asked and all that we ask under No. 7 is that there be an Order requiring the Defendant to supply the seniority rosters and that the Order—

The Court: 8 is seniority rosters.

7 is called "Security" in your Application, and you say that you have had to institute and maintain various security measures,—

Mr. Devaney: Well—

The Court: —to protect plant equipment and property; that the only portion of the work covered by any agreement is the work of bridge tenders. That's why I ask you if bridge tenders—

498 Mr. Devaney: Your Honor, I don't know which—perhaps we are reading something different. I'm reading the Application, on page 3, and No. 7 relates—

The Court: Oh well, I—

Mr. Devaney: It says, "Defendant"—

The Court: I did. I turned to Mr. Wyckoff's affidavit instead. It was the wrong thing. They are all in here. He divides it into nine points and the Application divides it into eight. I'm sorry.

Mr. Devaney: And the Application which I was referring to—

The Court: 6 is the bridge tenders.

Mr. Devaney: That's correct. And 7, all we are asking and all we have said—

The Court: 7 is the seniority rosters, and 8 is the Union Shop provision.

499 Mr. Devaney: That is correct, Your Honor.

The Court: All right.

I think, Gentlemen, before I hear from you, if you don't mind, I would like to break off a few minutes. Take about ten minutes.

(Short recess)

Argument By Mr. Shapiro

Mr. Shapiro: May it please the Court.

This is an extraordinary Application for relief from the terms of the Injunction which was issued in this proceeding on October 30, 1964. It is extraordinary because it asks that the Carrier be excused from the express requirements of the statute, which says without qualification that Carriers cannot change rates of pay, rules and working conditions as embodied in agreements except as provided in those agreements or as in Section 6 of the Act.

Now, there is no exception in the Act for strike conditions. We think Congress knew what it was doing
500 when it enacted the statute, that it put that in well aware of the fact that labor disputes do sometimes culminate in strikes. And we also think that collective bargaining agreements are negotiated with this background in mind.

Now, there is no exception for strike conditions either in the statute or in the collective bargaining agreements with which we are concerned here.

The Court of Appeals in the *Brotherhood of Railroad Trainmen* v. *Florida East Coast Railway* has found such an exception.

The United States doesn't agree that that exception is there and we wish to preserve the position that the statute should be applied as it was written.

However, the exception, as found by the Fifth Circuit, governs this Application. Now, this is as we stated in the opening statement a very narrow exception. And the agreements govern except to the extent that this Court may authorize departures on a select item-by-item basis and on a convincing showing that the departures are reasonably necessary to effectuate the Carrier's right of self-help.

Now, this showing has to be based on the totality
501 of the circumstances surrounding the dispute and the Carrier's position vis-a-vis the Union's.

I think that on this Application it is clear that the relevant proof falls into two categories. The general consideration relating to the history of the dispute was shown in the prior proceedings in this case and the prior proceedings before this Court of which it can take notice, and particular considerations relating to the item-by-item requests.

I would like to turn first to the general considerations:

I think the history of this dispute makes it clear that this Carrier is not coming into Court with clean hands. Since this controversy began, the Florida East Coast Railway Company has been found to have violated the Railway Labor Act, in one case in the District of Columbia, *United States* v. *Florida East Coast Railway Company*; in the instant case, in *Brotherhood of Railroad Trainmen* v. *Florida East Coast Railway Company*, and *Brotherhood* of *Locomotive Engineers* v. *Florida East Coast Railway Company*. It has also been found by this Court to have violated Public Law 88-108, the Emergency Arbitration Statute.

When the injunctions were issued last April,
502 1963, in *United States* v. *Florida East Coast Railway Company*, and in this Court's decision last December in *United States* v. *Florida East Coast Railway Company*, the Carrier did not comply. It made no effort to operate under the requirements of the statute. In fact, the Court of Appeals has said in the *Brotherhood of Railroad Trainmen* case that it has conducted itself with no pretense at compliance with the Railway Labor Act.

Until last Spring, it operated under so-called "Temporary Conditions of Employment" with a work force that it had recruited and manned on the Carrier's property without regard to the requirements of the law.

Now finally, having been brought to a point where it is ordered to comply with the law, it asks that the heart of the Order directing it to do so be cut out for its operating convenience.

At the present time, this Carrier is operating at approximately the same level that it operated prior to the strike.

Mr. Thornton has testified that it is moving 4800 cars a week and that this is about equivalent to the same season two years ago.

Now, it has achieved this level up to now by
503 operating illegally. The work force that it has acquired to do this has, the testimony shows, been at a level of about 400 non-operating employees for the last year, approximately, possibly some slight fluctuation. It reached that level under the illegal "Conditions of Employment".

Now, in the light of the Carrier's over-all operation and its much reduced staff, it is obvious that this strike up to now has been a tremendous boon to it, and I think this is probably why the most conspicuous omission from the proof has been any comparative figure on operating revenues.

The Carrier runs no passenger service. It carries less than car-load freight, at its convenience; although apparently this has recently been a profitable enterprise because it seems to be carrying a good bit of it. It has the cream of the business and less than half its former work force.

Now, I think, as far as this Carrier is concerned, that the strike can go on forever and it would not be in the least disturbed.

Now, I think nothing in the Court of Appeals' decision in *BRT* v. *FEC* implies that a Carrier's right to self-
504 help guarantees this kind of a windfall or guarantees that there will be an absolute return to pre-strike conditions. The ultimate object of the Railway Labor Act, as expressed in Section 2, First and 2, Second, is to bring about every reasonable effort on the part of the Carriers and employees to make and maintain agreements and to settle disputes and to do this by collective bargaining.

So, when the decision of the Fifth Circuit is applied, it has to be applied in the light and the spirit of the Act. And that spirit is that controversies are to be as narrow as possible.

Now, the proof shows us that FEC's estimate of any injury to its operation must be taken with a great deal of

salt. Last May, the issue came up in this proceeding and we were told, that if FEC had to comply with its collective bargaining agreements, the work force would have to be increased by 600 employees or service would drop 50%.

Now, this testimony was by the Carrier's Vice President in charge of personnel and it was buttressed by the testimony of the Carrier's President.

Now we are told that there was an error of about 480 employees in that estimate and that the true facts
505 are that FEC will have to reduce their service some 30 to 50% unless it can find somewhere 122, not 600, new employees.

Last May we were told, without qualification, that the Carrier didn't take less than car-load lots. Now we are told that it has been taking them for about a year and been doing it on a permit basis; and that at the present time it's carrying more less-than-carload on a permit basis than most of the railroads in the country.

Now, these discrepancies are explained in part by new operating methods, new machines; but the testimony of Mr. Davidson and Mr. Webb and Mr. Hales, taken as a whole, indicate that many of these marvelous improvements in operating methods had been in effect prior to May; that FEC, subsequent to May, has put a great many more of them into effect and that it will continue to do so in the future, but thus it will cut its work force and it should be able to get along with the collective bargaining agreements.

Now, these changes can be expected to continue. The Carrier has shown itself to be resourceful and imaginative in its managerial techniques when it operates illegally; and we can expect the same resources and imagina-
506 tion to be applied should it be directed to comply with the law.

It has closed many facilities unnecessary to it, particularly in light of its present operation which is exclusively freight. And over-all, it's pretty clear that these wonderful machines that Mr. Davidson, Mr. Webb and Mr. Hales

described at some length, the improved operating techniques, show that it certainly doesn't need to expect a drop of 30 to 50% immediately by being required to comply with the collective bargaining agreements.

Now, many of the demands that it has made for being excused from the agreements result not from the strike but from purely managerial decisions in relation to the strike. For example, in the Signals and Communications Department, there's new equipment there which cannot be operated either by the former employees or apparently by the present employees, according to Mr. Webb's testimony and his affidavit.

Now, the installation of this new equipment is not a reason, I think, to excuse the Carrier from the obligations of the collective bargaining agreements on the ground of strike conditions; and that's all we are concerned with here.

507 Now, some of the Carrier's staff difficulties come from other factors. For instance, its recruiting methods have to be considered. The testimony is that the Carrier relies on informal recruiting methods to obtain its employees. It doesn't advertise; it doesn't have agents out; the heads of departments call around, visit around; the Director of Personnel calls around and visits around. Yet we are offered an exhibit purporting to show its difficulties in recruiting personnel.

Last May, Mr. Wyckoff told us it would take some eighteen months to reach the requirements of the collective bargaining agreements. Mr. Hales told us that for his department it would take some eight months to recruit, using whatever his present methods are, a full force and four months to get about half of that force.

Now, these are factors which relate to the way the Carrier tries to get people. The figures that it shows in Exhibit II on the number of applicants are in part reflected by its recruiting methods.

Now, Exhibit II is interesting because it shows something

else about the turnover in this Carrier. The Carrier's total hiring in 1963 and ten months of 1964 was 850
508 employees against an average force of about 400. Something is happening on this Carrier which causes people to leave it. And this too is a factor not to be attributed, I think, just to the strike.

Now, the Carrier's recruiting problems also can be attributed to its own selective standards. I think we were told in the course of this proceeding that they are not much different and perhaps a little lower than the pre-strike standards for some jobs, and yet, in October of 1963, before the Federal Board of Inquiry, which was read into the record in this case, in the transcript at page 235, Mr. Thornton described their personnel program in great detail and, while I don't read the full text of what's already in the record—

The Court: Well, the high spots anyhow, I would like to have brought back to my mind.

Mr. Shapiro: All right. Well, it's actually pages 234 and 235 of the transcript of last May. Mr. Thornton testified that he would like to tell the Federal Board of Inquiry about the man-power requirements and he talked
509 about making plans for recruiting personnel, and then went on:

"To do this, we are very proud of the qualifications we have established for these new personnel. We have as of this time, in excess of 650 employees on the Railroad whom we have recruited or who have actually returned to work since the work stoppage. Now, these employees are being very closely screened. We are screening them from the aspect of their personal references. We are screening them through our special services department as to any criminal record they may have, screening them as to any educational requirement. We are now employing only people with high school education with lessons in lab class, whereas before they had grammar school. We are screening them as far as physical requirements are concerned.

We have instituted a very thorough physical examination and have included back Xrays. I make the comment
510 that we have been selective in our requirements. Of the 650 we have now, I would give you this as a conclusion. I can't give it to you exactly but I would imagine we have over 1000 applicants we considered for employment and we have gone into a good long-range program from the standpoint of employment capabilities."

So that was the story in October and that was the story last May. So part of their recruiting difficulties may come from their own standards and techniques, standards and techniques which may be legitimate in the proper context, but they are not a ground for saying that they should be excused form the collective bargaining agreements because of it.

Now, I think this Carrier is continuing to show its proclivity for being devious with the Courts. For example, the Government has stated that it has no objection to the Carrier's Request No. 3 to be excused from the apprenticeship requirements. Now, those requirements relate to age restrictions on who can be hired as an apprentice and—

511 The Court: Ratios.

Mr. Shapiro: —the ratios of apprentices.

The Court: Yes, sir.

Mr. Shapiro: Now, that's all that we intend to consent to. Yet we have a situation where, according to the testimony, the Carrier unilaterally decides when an apprentice meets the requirements for journeyman, notwithstanding the provisions of the agreements.

Now, the agreement, I think, is pretty plain when it's read as a whole. We pursued this a little bit with Messrs. Cooke and Wyckoff primarily to lay out the position of the parties, not to argue the matter through witnesses, but the special rules governing the various mechanics crafts in the agreement for the System Federation 69, the so-called Shop Craft Agreement, Exhibit 4C, requires four-years

experience or an apprenticeship, and the experience is experience in the industry. If this were not so, the supplements part in the agreement dealing with the hiring of temporary employees would—and containing such
512 provision as—well, the indenture provision itself wouldn't be in there. These are to restrict the journeymen craft to people in the railroad industry.

Now, we mention this simply because we want to make clear that, in consenting to No. 3 in the Application, we don't intend to waive anybody's rights under these agreements or to suggest that the Carrier can go beyond the strict terms of Item 3.

When the Carrier has found it to its interest to read these agreements strictissimi juris, it hasn't hesitated to do so, as was demonstrated in the testimony concerning the dismissal of the dining car employees and others.

Now, these have been some general considerations but they are very relevant to the type of relief to be given. Because the Carrier has demonstrated an extraordinary ability to resort to self-help by illegal means, we think it ought to be given a fair opportunity to try operating by legal methods, at least for a little while it ought to try. So we would suggest that in any Order of any kind authorizing departures from the agreement, there has to be some kind of restriction.

513 The most reasonable Order, I think, would be one which directs the Carrier to comply with the terms of the agreements and if, after a reasonable time, an operating quarter or two operating quarters, it has specifically had difficulty after having made an honest effort, then those difficulties can be considered. The Carrier has no experience in trying to comply with the agreements since the strike began, because it only brought itself into compliance three weeks ago.

Now, this brings us to the specific items as to which the Carrier has addressed itself. These can be best said in terms of Exhibit BB. They are directed to the specific departments.

In the Mechanical Department, the Carrier contends that it needs something over 52 new employees in order to comply with the agreements and that it has to cross craft and class lines and seniority restrictions in order to achieve this result.

Well, we know that the Carrier has reduced its requirements by 82 employees through various managerial improvements, some of which apparently were discovered because of the strike.

514 Now, if the strike, according to Mr. Hales' testimony, is a partly contributing factor to improved managerial techniques, would permit reduction of requirements, I think that complying with the collective bargaining agreement would be an even greater incentive in the Mechanical Department.

In the Maintenance of Way Department, I don't think there is any serious problem. There's only one gang involved.

In the Communications and Signals Department, it's largely a matter of a few employees and part of the problem in the Communications and Signals Department is that they have new equipment which is not operable either by the former employees or by the present employees, so this just isn't a ground for excuse.

In the Transportation Department, it's a question of craft line and seniority district. I think they are short one dispatcher. Again, the discrepancy, the lack of personnel, is not so gross as to lead us to believe that the Carrier would automatically suffer this 30 to 50% reduction that it fears. It may suffer some reduction. I don't doubt that it will for a time, but it can recover.

515 The same is true for the Accounting Department and the Freight Department. There is no problem in the Personnel Department. I don't think there's a real problem in the Stores Department; that that was conceded.

In the Personnel Department, it's a matter of one employee and that employee is a requirement that—or occupies a position, a requirement for which was established after the strike began. I don't think that there is any problem with the Personnel Department.

Now, what are some of the techniques the Carrier can use without going into a violation of the agreements?

Well, additional overtime is one. Apparently, in the five months between May and this hearing, a great many wonderful machines were discovered and put into operation. I'm sure there are more machines that can be found and operated. I think Mr. Davidson's testimony about the success they've had, both before last May and after last May, with new machinery demonstrates the possibilities in such a difficult area as Maintenance of Way.

Now, I think the same thing can be achieved in other areas. The Accounting Department, for example,
516 the Freight Traffic Department. These things may increase the Carrier's costs slightly but costs is not the primary consideration.

Now, the Government has raised no objection to the Carrier's request pertaining to bridge tenders. I must say that, after hearing some of the testimony dealing with this, I was a little puzzled as to why the Carrier could not make proper security arrangements for its bridges and still have an employee who complies with the collective bargaining agreement. If they need guards, they can put him beside him. If they need someone with unusual character and background, they can investigate their character and background before they hire them, a special investigation. They have such a program apparently and it can certainly be applied.

Items 7 and 8, dealing, respectively, with seniority lists and suspension of the Union Shop Agreement, simply have nothing to do with the Carrier's operating requirements. The Unions who are on strike anticipate that some day

the strike will end and that they will be able to adjust their seniority rights at that time. They have to protect the rights of their employees who are presently striking. I see no reason for this unusual secrecy. If there is harassment or abuse, there are legal procedures available to punish those who engage in the harassment or abuse, and there is no need for amending the Decree of this Court, which is what they have asked for, to condition complying with the law on its not being violated.

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Section 8 of the Union Shop Agreement really deals with —the request for excuse from the requirements of the Union Shop Agreement seems to deal primarily with the fear of future claims arising out of it. Now, if there is any problem on that, that can be raised in an appropriate forum, the Adjustment Board. The law is clear on what the obligations of both the Union and the Railway are. If the Union violates its obligation, there is a proper remedy for that violation.

Now, if they are granted authority to depart from these agreements, that should be conditioned for a reasonable period of time only. Otherwise, they become a permanent part of the strike situation and, frankly, this strike and all of the complex labor disputes which are related to it are not going to be solved, are never going to be solved if the Carrier is able to simply disregard the requirements under which the controversy is supposed to be conducted. Congress put the restriction in Section 2, Seventh for a purpose, I believe, and that purpose is to confine the area of conflict. That's one of the reasons why, assuming that exceptions can be authorized by the Courts, those exceptions have to be very narrow, very closely confined, so that the dispute doesn't, as it has up to now because of the carrier's illegal conduct, go completely out of control and show no prospects for an end ever.

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Thank you, Your Honor.

Mr. Milledge: May it please the Court.
The Court: Mr. Milledge.

Argument by Mr. Milledge

Mr. Milledge: The position of the Intervenors is essentially the position of the Government.

The request before the Court is a request not for permanent changes in the contracts, of course, but for
519 temporary changes, for temporary exceptions to meet a particular situation; so that in the concession made by the Intervenors on Item No. 3, it's of course clear that this is not a concession of contract change but simply a concession as a temporary matter that apprentices may be hired who are over the age of 23, and that there may be more than one apprentice for each five journeymen, in light of the contract which requires journeymen to have at least four years of railroad experience, which we concede is not available—that type of experience is not available to the Railroad at this time.

The request of the Railroad here is not a request under the opinion of the Court of Appeals. It is not an item-by-item approach. It is simply a blanket request for relief. Such a request for relief might have been oppropriate in the first few months after the strike started when there was a great deal of fluctuation and experimentation and change; but here we have the situation in which the Railroad asserts that it has 80% of its necessary man power to operate under the contracts and has had this during this past year.

520 The broad brush picture presented is that the Railroad has been continuously trying to increase its work force, but I think that is belied by the statistics and by what the Railroad has said in the past.

They increased their force from zero to approximately the present number, 400, during 1963. Now, they didn't show us any charts on that, an interesting omission, but the testimony of Mr. Wyckoff was that the present number of

non-op employees has been essentially the same during 1964.

Now, this is consistent with what their position was in another forum, that is, the Defense Inquiry Board. And Mr. Shapiro has read from a part of that but I think there's one other sentence of Mr. Thornton that is significant, and that is the sentence in which he says:

"I think we are approaching the point now where we are almost up to full man-power requirements."

That was October 1, 1963.

The reason that there has been no increase in the work force during this past year is that, we submit, a purely economic one; it is not as they have portrayed it,
521 that they have fine employment arrangement but they can't get the people. It's rather that they have had enough people to suit them, and now they have to abide by the contracts.

Now, it would seem to me—we don't have the exact statistics, but, in the nine months of '63, they increased their work force from essentially zero to 400 in about nine months. Now we have a situation in which they may have to increase their work force approximately 20%.

It would seem—I think the evidence is such that the reasonable inference would be that, if they must abide by the contracts, they can increase their work force to comply with the contracts in a very short time.

Now, by cross-examination, we attempted to deal with what we construe to be the situation presented by the Court of Appeals' opinion in the Trainmen case. It is conceivable that, even after a year and a half, there might be some highly technical personnel that the Railroad has some deficiency in, some specific item-by-item deficiency. And there have been, we did get down to a few specifics but that's about all.

In the Maintenance of Way, we found that they
522 have only one bridge gang and they would like to be able, on a brief temporary basis, to contract out

to another bridge gang; so we did get to one specific there.

There was some discussion of the CTC as a contract matter. There is a lack of one train dispatcher, for which a supervisor is presently being supplied, and Mr. Wyckoff is short an accountant in his office. But other than that, we don't have any specifics. It's just a general desire on their part to avoid the contract and to avoid it as long as possible.

We would suggest that—well, one other thing I think should be pointed out: That the Court of Appeals here, the decision came down on August 18 of this year, the hearing in this case was in May. There has been no evidence of any effort from May to August or, specifically, for the last three months, from August up to the present time, to come into a position where they were able to completely comply with the collective bargaining agreements without any reduction in service.

The employment level has stayed the same continuously.

523 Now, just one other thing about these documents, particularly BB and II. They are, of course, selective information but it would seem that there is something unexplained. The three department heads, Mr. Hales, Mr. Webb and Mr. Davidson, who spoke with some particular knowledge of their departments, showed that their departments increased to nearly present levels by the early part of the year, but those departments have shown, in the figures given to the Court, some slow increase during this year; and yet we have the figure given that, as a whole, there were only 390 non-op employees on November 2nd, 1964 and Mr. Wyckoff testified in May that there were approximately 400, so apparently some other departments, they have actually reduced forces, which I think tends also to undergut any characterization of some drastic consequences if the Railroad is required to abide by the contract.

We would suggest that there has been some showing as to a few specifics, such as the one train dispatcher, the

accountant, the bridge gang, and the CTC, and that on a temporary basis, perhaps one or two months, that these positions be permitted to be filled by the supervisors
524 or the work presently contracted out be completed but, other than that, there has been no showing along the lines suggested by the Court of Appeals when it entered its Order and made its decision and created this exception in the law.

The Court of Appeals characterized Your Honor's position as being in the engineer's seat, but Your Honor hasn't had any specifics presented to him, to the Court, other than in these very isolated instances which would permit Your Honor to make any, other than these specific exceptions, and certainly they should be on a temporary basis.

Now, so that is our suggestion: That if there has been any showing at all, it is one or two isolated instances which would be in line with the Court of Appeals' Opinion.

Rebuttal Argument by Mr. Devaney

Mr. Devaney: Your Honor, I will be very brief.

Let me say at the outset that we have here the same basic contentions that have been made over and over concerning the clean hands of the Florida East Coast.
525 Now, I don't think that it would serve the purpose of making an appropriate decision here to go into any great detail.

Let me say this, so that it may be clear as to what the facts are: That when Florida East Coast gave the Notice in April of 1963 that it was putting into effect and operation the work rules as to operating unions, these were not the non-operating unions but were operating unions, it did so before there was any appointment or creation of an Emergency Board, and it followed the decision of the United States Supreme Court that the parties were free to resort to self-help, subject only to the possible appointment of an Emergency Board.

Now, when the Board was appointed, it was appointed to consider the dispute in the matter with which the Southeastern and Eastern and Western Carriers Conference Committees were involved.

Now, prior to this by some period of time, Florida East Coast had withdrawn and given notice to everyone. Now, we had given the notice before this Board was created and at a time when we had every right to put those into effect.

Now, the fact that the Court decided that, because
526 we had not given the notice of withdrawal to the Mediation Board, we couldn't withdraw without having done so, or that the Mediation Board was entitled to rely on our still being a part of this because the Mediation Board had not been given the notice of our withdrawal, does not mean that we acted without a complete legal justification for our position.

Now, Number 2: The action that was brought pursuant to Public Law 88-108, now this was a matter in which it was first contended that we had no right to give an additional Section 6 Notice. Now, they abandoned that position pretty much and conceded that, yes, we could give the Section 6 Notice but we couldn't put it into effect.

Now, the dispute, which was a bona fide and honest dispute, was whether the Notice that we had given in 1963 did include the Notice that had been given in '59.

Now, again, this was not an attempt to avoid the provisions of the Act at all, but was based on the belief that we had the right to give the Notice that we gave.

And what happened when the Notice was given?

Mr. Shapiro said that we have made no pretense
527 of complying with the Railway Labor Act.

Let me say that we have done far more than attempt to comply with the Railway Labor Act. We have made every effort we can to comply and we did, in accordance with that Notice.

Now, in response to the Notice, the Unions declined to bargain. Now, it is true that the dispute there was over

the presence of the Reporter in part but, again, Your Honor, this was a question of the Unions, I think as they have subsequently indicated, that they did not intend to bargain with us anyway until the matter was settled on a national basis and that, therefore, it's clear that their refusal was simply a bit of window dressing to justify what they did.

Now, we come down to this case:

Clean hands? Well, we might have quibbled when the Order was entered. We might have come in and asked Your Honor to please free us from putting these wage rates into effect. But we have not done any such thing. We complied with your Order fully and completely and we have put those wage rates, we put all of the conditions into effect that we could and we did so on November 13.

528 Now, we have attempted, to the extent of our ability, to comply with the Order of this Court.

Now, why? What's left that we can't?

As we have said from the time the strike began, we have hired people as rapidly as we could.

Now, when Mr. Milledge and Mr. Shapiro stand before this Court and say that there are no records and no evidence to indicate that we have continued this process of hiring, they certainly are ignoring the uncontradicted evidence and testimony in this record. And I would only direct the Court to Defendant's Exhibit II, which shows that in the year 1964, for the first ten months, that Florida East Coast hired 308, Your Honor.

Now, when they say that the number was essentially the same without change, they ignore the fact that 308 people, non-operating employees, were hired in the calendar year 1964, for the first ten months of 1964.

Now, they also ignore the fact that we have had a tremendous drop in applicants.

The Court: Drop in what?

529 Mr. Devaney: In applicants, applicants who have come from our recruiting efforts as well as those who have reported in the office and have sought employment in that manner.

Now, the testimony is perfectly clear that we have never advertised but I don't believe that any Carrier can be required to do more than the Florida East Coast has. It has solicited the only sources of fully qualified people available to us, namely, the railroads. We have solicited all of them that we know about that have seemed to offer productive posibilities, people who might come to work because they were furloughed or laid off from other railroads.

Now, the question of having made—Mr. Shapiro says we don't have agents out, we don't have this out and so forth; this belies the actual facts, Your Honor, that we have in fact hired in the two years more than 850 employees in the non-operating category alone.

Now, we have said here over and over again that the difficulty that we face at this point and the reason that we have made this request to the Court is that virtually all of the people that we have hired since the strike
530 began, except the, well, the ones I'm talking about in these exhibits are all new employees, these people are not fully qualified and they are still not fully qualified, Your Honor. And partly in training them and partly in performing the work, this is why we have to continue to use the only people who are fully qualified to complete the rest of the duties that these people are not and have not yet acquired the skill to perform.

Now, they cannot, they are not going to acquire these skills in the next two to three months. We are continuing to train them. We expect to continue to train them. We are hiring. We expect to continue to hire. And this is the most that any Carrier can do under the circumstances. We have continued without diminution the hiring program that we put into effect.

Now, when Mr. Shapiro and Mr. Milledge suggest that there is no explanation on the record as to why this number has remained static, or when Mr. Milledge says that the real reason is that we don't want more, we certainly would not have continued to hire at the rate we have hired

if this were our true intention. We have tried to increase the number of people that we have over-all. We can
531 only train so many people at a given time because we have limited number of supervisors.

Now, the assertion that this strike has been a boon to Florida East Coast is again totally fallacious and it is again an attempt on the part of the Government to make evidence without making any effort to introduce any evidence in any proceeding that it's involved in.

Now, as the testimony here has indicated, Your Honor, security alone is costing the Defendant a tremendous amount of money. Mr. Thornton said $1,000 a day.

We have had locomotives blown up. We have had trains blown up, bridges blown up. And this has represented a tremendous cost to the Railroad.

Now, to come in and say that this has all been gravy to Florida East Coast, therefore Florida East Coast should be punished, is simply, I believe, overlooking the true facts in this matter. And the real truth is that what Mr. Shapiro is saying is "Don't only punish the Florida East Coast but punish the shippers who are using the facilities of the Florida East Coast", because of some—

532 The Court: There are no earnings figures here.

Mr. Devaney: That is correct.

The Court: All that he commented on was the lack of earnings figures.

Mr. Devaney: That is correct, Your Honor. And if he had considered those significant and relevant, he could have asked for them.

The Court: He called it significant.

Mr. Devaney: That's right.

We say that the problem that is presented by this Application is whether there are problems relating to our operation that justify the establishment of reasonable conditions to permit the effectuation of our right to operate during the strike. This is what we have directed our attention to.

Now, if Mr. Shapiro feels that the earnings figures were significant, he could certainly have asked for them.

We are trying to establish what problems we are
533 faced with in operating the Railroad. That is what we believe we have done by showing to the Court those areas in which we are still not able to comply, without using the supervisors to perform part of this work, without crossing the seniority districts and craft lines, because the people—or, using them in that manner, these are the only people that we have.

We have continued our hiring and training program. We have not stopped it, as Mr. Milledge has made the assertion. And the testimony is uncontradicted that we have not stopped it. And the hiring, the number of people hired in both 1963 and 1964 certainly indicates that we have made every reasonable effort to hire them; 542 people hired in 1963, 308 in 1964.

Now, compare, Your Honor, the number of applicants, 2035 in '63 and only 1122 in the first ten months of '64.

And why? I believe that there can be little doubt that the bombings, the sabotage and other activities, beginning in February, was the direct reason for the tremendous drop in the number of applicants. In the month of
534 February, '64, it went to 51 applicants where there had been 242 in January of '64.

Now, these are part of the problem that we have had to operate under and we try to operate under them the best way we know how, by recruiting and training people as rapidly as we can. This we have done from the beginning. This we are doing now. And when Mr. Shapiro suggests that we have not been doing that or that we could in a short period bring up the number of people, this isn't correct.

Now, he talks about marvelous machines.

Well yes, of course, we have put automatic equipment into the Accounting Deparament. We have expanded the use of it to areas we had not previously used it. But we

are faced with the problem, Your Honor, not so much in the Maintenance of Way—we have said that the only problem in that Department is what we should do with respect to the bridge gang. Now, we have said that, we brought this up, the practice in the past has always been, there has never been any doubt, that the Carrier has the unquestioned right to contract out any work that it does not have the
535 equipment or the employees qualified to perform.

Now, this is what we have done but we have brought it up here so that we can avoid being faced with a contention in some later proceeding that, because we hadn't brought it out, we were therefore somehow in contempt of the Order of the Court; but we say, as we have said before, that this is a right that we have always had. It is a right that we have because we do not now have the qualified personnel to perform this work. And this is precisely what has always been done on this Carrier and this is what is done by every other Carrier.

Now, the question of the specific items:

What we have shown, Your Honor, is that you cannot go down item-by-item and say that Supervisors A, B and C must perform five minutes or ten minutes of the day doing scope work, or he must do Operations 1, 2 and 3. The problem is that in training these basically unqualified people we have to use the supervisors to perform some part of this work and, as we continue to hire and train, this is going to be a continuing problem until we have a full staff of fully qualified employees.

536 Now, the use of employees across seniority districts and across craft lines is precisely the same.

Now, have we shown the specific areas in which we need these people and in which the problem exists? And I suggest that we have and, if there is any question or if the Court would desire to see all of the bulletins that were issued, we will certainly be glad to produce them. But the 114 additional people, Your Honor, those are the skills, those are the areas in which we do not have qualified people

and these are the skilled employees that we have not been able to train. We haven't been able to attract from other sources and we have no alternative but to continue to operate in the way that we have been operating or reduce the service.

Now, to say that we might not have to reduce the service, again is to ignore the uncontradicted testimony on this record. 30 to 50% reduction? Why?

Because these people, these supervisors and these employees who are operated across seniority districts or craft lines, are doing work that is essential to the operation
537 of the Railroad and we cannot continue the level of freight that we now handle unless we can continue to perform this work in the manner we are. Otherwise, it means a reduction.

Now, Mr. Shapiro has suggested that because this estimate back in May, and we made it perfectly clear that it was an estimate and how it was arrived at; that when we now say we only need 114 additional people that we have had this tremendous change since that time. Well, this also isn't entirely true.

Virtually all of the equipment that Mr. Davidson testified about was acquired after May.

The Court: You were hollering wolf in May.

Mr. Devaney: I beg pardon?

The Court: You were just hollering wolf in May.

Mr. Devaney: We weren't hollering wolf in May, Your Honor. We—

The Court: It has to be on the record. But you are
538 now showing what you actually need.

Mr. Devaney: Your Honor, we said in May that, prior to the strike, we had X-number of employees. We now have Y-number. And that our estimate would be that we would need 600 people.

The Court: That in order to comply, you would have to hire 600 more.

Mr. Devaney: That is correct.

Now, we have since that time acquired—

The Court: When a responsible official of the railroad takes the stand under oath and says, "This is my best estimate"—

Mr. Devaney: That is correct.

The Court: —I don't think he is just pulling the figures out of the sky. If that's all he's doing, you tell me that he was just trifling with the Court in May.

Mr. Devaney: That isn't correct, Your Honor.

539 I'm saying that, since May, we acquired in the Maintenance of Way Department, by way of one example, virtually all of the equipment that Mr. Davidson has testified about that account for 112 people not being required.

Now, the only equipment that was involved prior to that time was the "hi-rail" truck, which we received in December, '63 or January of '64, and which he estimated became fully equipped by March.

Now, by March, we had had some but not much experience with the use of the "hi-rail" truck. Since that time, since May, we have acquired a great deal of additional equipment, which Mr. Davidson identified and testified to, and which was further identified and covered in Mr. Thornton's affidavit. Now, this equipment, Your Honor, has resulted in an over-all decrease in the requirements of this one department of 112 people.

Now, all I am saying is that we have shown and we have —one of the purposes of breaking down the requirements and reduction of requirements department by department was to show why we did not need as many people as we had originally believed we might need.

540 Now, the change in methods, the change in technique, has continued in every department since the time we were here in May; and the statement that we have not done anything since the decision was ordered is also not true.

We have gone back and, to be very frank about this, Your Honor, we have some supervisors who had never previously operated under the prior agreement with any one of these Unions; so that there has been some problem of their finding out completely what the provisions of the agreement would require and necessitate from the standpoint of man power.

Now, on this basis, we are saying that the 114 people—now, the job descriptions of many of those positions have already been read into the record, and it clearly demonstrates and we will be glad to submit the remainder if the Court would desire to have them, but it clearly demonstrates, Your Honor, the kind of work that we cannot provide because we don't have these skilled people available to us.

Now, one suggestion was made by Mr. Shapiro as to what we might do. He said, "Well, one thing they
541 can do is they can work more overtime."

Well, this was raised specifically in the testimony, Your Honor, and there isn't any doubt that it was uncontradicted in any way that if a person is not qualified to do the job in eight hours, he isn't going to be any more qualified to do the job if he works twelve hours. The problem is that, where these people are not qualified to do the work, somebody else has to do it instead of the unqualified person. This is the problem that we have.

Now, we are not solving the problem by working the qualified person, who is the supervisor, overtime. This is no solution. Our problem, and the only reason we have a problem, is that the only way we can perform the work is to use that supervisor to perform the work he's the only qualified person to perform it.

Now, it has also been suggested by Mr. Shapiro that, on the question of the Union Shop on future claims, he says, "Well, the Railroad can go to the Adjustment Board."

Now, this is an interesting comment, because he seems to be saying that when something affects the Railroad we

ought to go to the Adjustment Board, but when it
542 affects the Union the Court ought to decide it.

Now, I merely suggest that what is to be applied to one must be applied to the other. And we are saying that this is an area that subjects us to future claims because of the interpretation of the Union Shop provision, and we believe that there should be a provision saying whether or not the Union Shop provision is now to be enforced or whether it should be held in abeyance, as we believe the Fifth Circuit has decreed, unless and until they have offered membership to the present employees.

Now, Mr. Shapiro also said that well now, we ought to have a fair opportunity to operate legally and then, if we have trouble, come back in.

I think this is a little bit like saying that, "Well, let's cut off Florida East Coast's head and, if it hurts, it can come back in and ask for relief."

The only trouble is that, when this happens, the patient dies.

Now, what we say here, Your Honor, and there has been nothing suggested contrary to the evidence and testimony offered here, and that is that we can operate and provide the level of service we are now providing only if we
543 continue to use supervisors in the manner that we have had to use them to perform the part of the work for which they only are qualified to perform, and to cross the seniority districts and the craft lines.

We have said and there is no question whatever on the record that if we cannot do that, it will mean an immediate reduction of 30 to 50%.

Now, to say that there are only these isolated areas in which we would have some impact is simply not correct. In every one of the departments—and if I may refer you to Defendant's Exhibit BB—if you take the departments department-by-department, the Mechanical Department involves 52 additional jobs which we need. Now, without those 52 jobs, Your Honor, that work can only be per-

formed by using supervisors, whether they be exempt or non-exempt supervisors or by people who are not fully qualified with respect to whom part of the work must be done by the supervisory personnel; or we must use people across craft and seniority lines. Now, there's no other way we can operate the Mechanical Department without those 52 people, unless we do that.

And it goes through every one of the departments
544 involving a total of 114 jobs.

Now, it is true that we have not gone through and high-lighted every individual one of the 114 jobs, but we have illustrated the impact that those jobs would have, including such jobs as the dispatcher.

Why does the dispatcher have the impact? Well, if we don't have the dispatcher for whatever period his services are not covered, the Railroad simply cannot operate.

And so we got through every one of the 114 jobs that are critical to our operation. And every one of the 114 jobs is now being performed in some manner. And the only way we have of performing it is with supervisors or by crossing the craft lines or seniority districts.

Now, to say that this would not have the immediate impact that we have shown that it would is not being realistic and it's ignoring completely the uncontradicted testimony and evidence on this record.

And I submit finally, Your Honor, that the real purpose of this suit is to bring about, by using the Court as
545 the means of terminating or reducing the operation of the Railroad, which the strike itself has not accomplished in as desirable a manner as the Unions have sought to accomplish.

Thank you very much, Your Honor.

The Court: I think the Government ought to have a right to reply to that last statement. I'll just tell you that I'll throw it out the window and you don't have to reply to it. It will save some time. We can spend a good many profitless hours, I think, arguing over why the Government brought this suit.

Is there anything else you want to say?

Mr. Devaney: Your Honor, there is just one other thing: As you have indicated I might, I will supply a copy of the agreement that I referred to. And I wonder if I might inquire—the total agreement, the agreement of August 21, 1954, is 14 pages in length; there are only two pages that deal with the establishment of the rule to amend existing rule as to time limit in presenting and progressing claims or grievances. Now, it would be my suggestion, Your Honor, that only that part—

546 The Court: Well, I think you might agree with Mr. Shapiro and Mr. Milledge how much of this should be put in, mimeographed and supplied or Xeroxed and supplied, however you want to do it.

Mr. Shapiro: Only the relevant portion.

Mr. Milledge: It is only 14 pages and it is an agreement that, if it isn't already in the record, it is a part of something else and—

The Court: I thonght it was 50-odd pages.

Mr. Milledge: No.

Mr. Devaney: I don't believe it is, Your Honor, the particular one. There are a whole series of them but I believe that particular one is only 14 pages from the beginning of it over to the signature page.

The Court: Well, that doesn't seem to me a very arduous chore. You were asked to supply it; go on and put it in.

Mr. Devaney: Very well.

547 The Court: Gentlemen, I expect to deny this application in most particulars. There are certain fields where limited permission to deviate should be granted. There is no question but what there may be this limited, the age and apprentice ratio under No. 3, that that should be permitted. Nobody questions that.

Under No. 6, it would seem to me that for a limited period and I would say three months, that you may continue to use supervisors or contract personnel for bridge tenders,

that you may make application for a further extension of that at the end of the three months or before the three months expires.

As to No. 2, permitting supervisors to perform craft work so long as the defendant doesn't have sufficient personnel, I want to—well, starting with No. 1, No. 1 will be denied, the right to cross craft or seniority district restrictions.

As to No 2, I think you should be permitted to fill one dispatcher's job with a supervisor for a limited period and I would say three months there and let you, if you haven't been able to recruit this additional dispatcher, and under No. 2, frankly, I want to review this matter and see if there may not be other specific exceptions which should be granted.

548 No. 4, there may be specific examples that we would have to make a similar exception to the exception made under No. 2.

Under No. 5, I think it perhaps should be spelled out and made clear that contracting out to the extent and in the areas that contracting out is now going on may continue, but that there should be an additional application if further deviation is contemplated. That's specifically in this bridge construction or bridge repair field where you've got this one contract gang as I understand it now working out here between Bowden and Bayard in the swamp out there.

Mr. Devaney: That is correct, Your Honor, and also the CTC installation.

The Court: Yes, sir; well, I think the CTC is the same thing.

6, I've covered. 7 would be denied. I've heard this thing I don't know how many times. There is a tendency for these things to sorta run together in your mind but I've heard this thing about the grave consequences to follow the furnishing of seniority rosters and extra board lists and that sort of thing several times and maybe it's

a deficiency with me, I don't know, but I haven't
549 yet caught any significance to it and I don't think any showing has been made here. That will be denied and I'm clearly of the view that No. 8, the Union Shop matter is not the type of exception that should be raised here and No. 8 will be denied. I will try to work out an order in a reasonably short period of time to formalize what I said here and to pick up these areas where I've indicated there perhaps should be furthed specific deviations permitted.

I hope that this announcement will permit the defendant to go ahead and get in compliance in the respects I have indicated and I hope further that the ones that I've left open to be covered by the order, that there will be no further insistence by the Government or by the Intervenor that there be a compliance until that is actually spelled out. In other words, do you see what I mean, that—

Mr. Milledge: Yes, sir, but—

The Court: Until I've told them under these limited categories where they may deviate, why let the matter remain as it is.

Mr. Milledge: And that's of course in the area of
550 supervisors?

The Court: That's right.

Mr. Milledge: Yes, and the only area which could be open to doubt is some area which have been specifically referred to here?

The Court: That's right. I don't conceive what I'm told to do in the other case, which is the authority for permitting a deviation because of strike conditions, I don't consider that I'm told to do anything more than on an item by item showing of strike caused conditions to permit deviations. I don't think that I'm given a mandate, because it's shown that a supervisor has to perform scope duties in one particular place with regard to one particular job or work, that that is an excuse to just wipe out the injunction all over the rest of it. That just isn't the sense of the thing.

At any rate, I'll try to give you an order within the next few days.

Mr. Shapiro: Will Your Honor require any submission of a stay order at this time or shall we just treat it like—

The Court: I hope that what I said before will
551 take care of the stay informally until an order can be entered, if I have the assurance of counsel.

Mr. Shapiro: The Government will agree to that.

The Court: I hope it's manifested to the defendant and the defendant's counsel in these areas where I've indicated that an order, that the request for the right to deviate or not adhere, in those areas, that they will proceed immediately to get in compliance.

Mr. Devaney: Your Honor, may I make this request.

The Court: I think I know what it is and I think the answer is no, but go ahead.

Mr. Devaney: As I understand your ruling, you are denying the right to continue to use employees across craft lines?

The Court: Yes, sir.

Mr. Devaney: And across seniority districts.

The Court: Well, I don't—if you want Mr. Sheridan to type up what I said there, he can give it to you. I
552 don't want to go back down this list now.

Mr. Devaney: No, I don't intend to, Your Honor, but what I wanted to point up is this: Until we—we have already to the extent that we can, Your Honor, complied with the order not to cross craft lines and not to cross seniority districts, and without reducing the service, we cannot comply fully. Now, what the overall effect on the operation is going to be, we cannot determine until we have the final version of your order. I merely request—

The Court: Let's say this then, I'll give you an order by tomorrow and you can wait until tomorrow to come into compliance.

Mr. Devaney: Could we, while we are at it, could we say that there would be at least a two or three day period

after the order is issued so that if it appears, No. 1, what I would like is an opportunity, Your Honor, to see what the order in its final form will mean as far as the effect on the service that we are providing at the present time; and No. 2, if we must seek relief in the form of asking a stay, we need to know what impact it's going to have. This is the only reason for making this request in this form
553 at this time, perhaps to defer it until Tuesday of next week, if the order is issued tomorrow.

The Court: All right; all right, this thing has been going along long enough to where I certainly don't want to make it any more difficult for you because of any ambiguity on my part or any lack of specificity and I think it has been going on long enough to where a delay of three or four or five days is just a drop in the bucket. It doesn't make that much difference. It's minimal, I mean, compared with the time that you have been violating the law. I'll let you go on and stay in violation for a few more days. I don't consider the request unreasonable.

Mr. Devaney: Thank you.

The Court: All right, we'll take an adjournment until further ordered.

(And thereupon the Court was adjourned at 1:12 o'clock p.m., on Wednesday, December 2, 1964.)

554 CERTIFICATE OF REPORTER

I HEREBY CERTIFY that the foregoing is a true and complete transcript of the proceedings detailed therein, reported by me personally and transcribed under my supervision.

JOSEPH A. SHERIDAN
Joseph A. Sheridan,
Official Reporter.

[fol. 903]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—May 21, 1965

(omitted in printing)

[fol. 904]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22134

FLORIDA EAST COAST RAILWAY COMPANY,
Appellant-Appellee,

versus

UNITED STATES OF AMERICA, Appellee-Appellant,

(AND REVERSE TITLE)

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

OPINION—July 21, 1965

Before TUTTLE, Chief Judge, EDGERTON,* and SMITH,** Circuit Judges.

TUTTLE, Chief Judge: This is another chapter in the long dispute between the Florida East Coast Railway Company and its employees. It comes to us by an appeal by the [fol. 905] Railway from a preliminary injunction entered by the district court. That injunction, entered after the decision by this Court in *Florida East Coast Railway Company* v. *Brotherhood of Railway Trainmen*, 5th Cir., 336

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* Senior Circuit Judge of the D. C. Circuit, sitting by designation.

** Of the Third Circuit, sitting by designation

F.2d 172, purports to put into effect what we there said would be permissible deviations from the collective bargaining agreements during the continuance of a strike. The dispute which brought about the suit in the earlier case and which caused the United States to file the suit in the instant case, is one and the same except that the 11 nonoperating unions whose members will be the beneficiaries under the present suit were the employees who went on strike on January 23, 1963, whereas the Brotherhood of Railway Trainmen, the plaintiff in the earlier case, was not on strike but its members observed the picket lines and thus were in substantially the same position and desirous of similar relief.

On the record there before us we made a number of holdings which, unless changed in this case, are in effect the law of the case. These holdings were included in the last full paragraph of the opinion, 336 F.2d 172, 182, which we here quote:

> " . . . The FEC is free to operate under the 1949 collective bargaining agreement amended by the November 2, 1959, notice, but FEC may not institute changes in rates of pay, rules and working conditions encompassed by the July 31, 1963, and September 25, 1963, notices until the statutory procedures are exhausted. To do so would be to frustrate the statutory mechanism [fol. 906] for orderly settlement of major disputes. This portion of the District Court's holding is clearly correct. It is, however, free to institute and maintain such employment practices, etc. as are, and continue to be reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions. We do not express any opinion as to the outcome of the District Judge's examination of proposed changes under the select, item-by-item approach that we articulate. However, since he has enjoined the FEC from operating under any terms except those embodied in the pre-November 2, 1959, agreement, we think the most

rational approach is to continue our stay of March 17, 1964, until the District Court has an opportunity to consider the nature and scope of the orders to be entered consistent with this opinion. As soon as the District Judge takes hold of the case, our stay will automatically expire."

When the motion for preliminary injunction in the present case came on before the district court, the district judge delayed handing down his decision because of the pendency of the appeal in the earlier case. After this Court's decision was handed down on August 29, 1964, Judge Simpson entered injunctions in both cases. On October 30, 1964, the trial court restrained the FEC from continuing in effect or implementing in any respect the changes in rates of pay, rules, or working conditions announced in the §6 notices of September 24, 1963 and July 31, 1963, from implementing or continuing in effect the "conditions of em-
[fol. 907] ployment" of September 1, 1963 and from

"making any other changes in rates of pay, rules or working conditions of its employees in crafts or classes covered by existing collective bargaining agreements except in accordance with the procedures of the Railway Labor Act or except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court during the pendency of the current strike."

On November 12, the FEC filed in the trial court an application for the approval of certain employment practices which it contended were "reasonably necessary" to enable it to continue to operate during the strike. The court granted a stay of its earlier order insofar as it required the FEC to adhere to its agreements with respect to the requested applications pending a hearing on the application for approval of the specific employment practices.

The employment practices departing from the existing collective bargaining agreements which FEC sought permission to put into effect were as follows:

(1) The use of existing personnel to do work across craft lines and seniority districts;

(2) The use of supervisors to perform craft work in the absence of sufficient qualified personnel;

[fol. 908] (3) The exceeding of apprentice and/or trainee ratios or maximum age limitations contained in existing agreements;

(4) The use of non-exempt foremen to perform scope work in the absence of sufficient qualified personnel;

(5) The contracting out of work which FEC did not have personnel available to perform itself;

(6) The performance of the work of bridge tender by supervisory or contract employees;

(7) The furnishing of seniority rosters to labor organizations only if a protective order issued from the court making misuse of the information contained therein punishable as a contempt of court; and

(8) The treating of union shop agreements as void and unenforceable as to replacement workers and returnees until the labor organizations demonstrated their intention to make membership therein available to new employees without discrimination, after which the new employees should have thirty days in which to apply for membership.

Following the hearing on the merits of these several applications, the trial court, in an order entered on December 3, 1964, denied Numbers 1, 4, 7 and 8 but granted Number 3; denied Number 2 except for several positions for a limited time; denied Number 5 except that FEC was per-

[fol. 909] mitted to continue to contract out that work which was presently being contracted out; and denied Number 6 except that FEC was permitted to use contract or supervisory employees as bridge tenders for a restricted period (later extended by supplementary order).

The Railway filed its notice of appeal from the order dated October 30 and the order dated December 3, denying approval of departures from the existing contracts in the respects requested. The United States filed a cross-appeal from both injunctive orders.

A threshold question is raised by a motion by the Railway to dismiss the appeal of the United States on the grounds that the United States has no standing to litigate this case and, as an appellant, it is not a party aggrieved by the decision of the lower court. This motion to dismiss was supported by memoranda but this court, by order dated March 12, 1965, directed that the motion be carried with the case to be heard and considered at the time of the hearing of the case on the merits.

We dispose first of the contention that the United States has no standing in the litigation. The contention of the Railway is that since there is here no actual "interruption to interstate commerce" the United States has no right under the Commerce Clause of the United States Constitution to maintain the suit. This distinguishes the case, the Railway says, from *Re Debs*, 158 U.S. 564, in which it was held by the Supreme Court that a strike then in existence against the railroad gave the United States standing to seek an injunction to prevent a substantial part of commerce from coming to an actual stop. The Railway further [fol. 910] contends that the United States has no inherent power to litigate for the purpose of "protecting the jurisdiction" of the National Mediation Board, which jurisdiction is said to be endangered by FEC's alleged violations of the Railway Labor Act. The standing of the United States as an appellant here is further contested by the Railway on the theory that it was not an aggrieved party as a result of the decision of the court below.

The United States contends that its right to file the original action is threefold. It says (1) It has a right of action based upon the Commerce Clause of the Constitution to enjoin conduct which obstructs interstate commerce, under the *Debs* case; (2) it has a right of action to enforce the provisions of the Railway Labor Act, and (3) it has standing to sue in order to protect the jurisdiction of the National Mediation Board, and to aid that agency in the carrying out of its statutory functions. We think we need go no further than to hold, as we do, that the allegations of the complaint touching on the threat of obstructing interstate commerce is sufficient to bring the case within the ambit of the court's decision in *Re Debs, supra.* See also *United States* v. *City of Jackson, Mississippi,* 5th Cir. 318 F.2d 1. Not only the allegations, but the proof adduced on the hearing for preliminary injunction, establish at least preliminarily that the actions of FEC, which we have, by our earlier decision, found to violate the Railway Labor Act, are a substantial threat to the free flow of interstate commerce. Moreover, as called to our attention by the United States, the Act itself in 45 U.S.C.A. 152 Tenth seems to authorize this type of [fol. 911] proceeding by the United States. This provision is as follows:

> "The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, . . . It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof . . . "

Finding, as we do, that the United States had standing to bring the action, it follows necessarily that, having not

completely prevailed in the trial court in seeking to prevent all modifications of the existing employment contracts, the United States may be considered as an aggrieved party for the purpose of filing its cross-appeal.

On the merits of the appeal both the Railway and the Government reargue much of what has already been decided by this Court in the *BRT* case, *supra,* and both formally in their briefs request a modification of the Court's decision in that case. The United States particularly while stating that the solution there was probably as equitable a one as could be devised, if any deviations at all could be recognized on account of strike conditions, nevertheless [fol. 912] contended that under the statute no deviations were permissible. As we stated in the *BRT* case, 336 F.2d at 181, "when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each. On the side of labor, it is the cherished right to strike. On management, the right to operate, or at least the right to try to operate." We then stated, "But this right of self-help is not a license for wholesale abrogation of the agreement. As the term implies, it is help which is reasonably needed to meet the impasse of a railroad desiring to run and unions unwilling to furnish workers." We concluded that the manner in which this impasse could be resolved was to permit the Railway "to institute and maintain such employment practices, etc. as are, and continue to be, reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions." 336 F.2d at 182.

We are not disposed to modify the law of the case now that the trial court has undertaken to carry out the mandate in the *BRT* case. We shall undertake to determine whether, in the case before us, the court has adequately understood and given effect to our earlier decision.

The Railway makes a major attack on the procedural steps which the trial court imposed on it, that is, forbidding it to deviate in the slightest degree from the exist-

ing employment contract "except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court . . . " The Railway contended that it should be permitted to institute the deviations and leave it to the United States [fol. 913] or the Brotherhoods to complain to the trial court and carry the burden of proving the deviation not to be "reasonably necessary" in the strike conditions.

We think that the prior decision of this Court was so worded as to permit the trial court to adopt the procedure which it followed in entering the injunction of October 30. We think it entirely appropriate that since a departure from the employment contracts is, as clearly stated by us in our prior opinion, the exception even during the strike it is appropriate for the burden of showing the necessity for such departure to be placed on the party claiming the privilege.

Coming finally to the specific departures permitted and forbidden by the trial court to the Railway, we note that in our earlier opinion we made the following comment: "While this appears to move the Judge from the firing line, Townsend v. Sain, 1963, 372 U.S. 293, 319, 83 Sup. Ct. 745, 9 L.Ed.2d 770, into the locomotive cab, it is not for him to decide what to pay, etc. His task is to pass on what FEC had done or proposes to do." We think it even less appropriate for this Court itself to attempt to take the engineer's place in a locomotive cab. We know full well that the distinguished trial Judge has had a long familiarity with the Florida East Coast Railroad and its operations, and more particularly in recent years he has had much experience with its labor problems. We think that his findings and determinations with respect to the departures from the employment contract reasonably necessary under strike conditions are as much entitled to be undisturbed except upon a finding that they are clearly erroneous as [fol. 914] are other findings of fact by a trial court sitting without a jury. We find none of his determinations in this

respect to be without a substantial basis on the record as a whole to support them. We therefore decline to interfere either with these findings or with the normal discretionary power of the trial court in the granting of interlocutory orders in such a case as this.

On the appeal by the Florida East Coast Railroad Company, the judgment is AFFIRMED. On the cross-appeal of the United States, the judgment is AFFIRMED.

[fol. 916]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 22134

D. C. Docket No. 64-107-Civ-J

FLORIDA EAST COAST RAILWAY COMPANY,
Appellant-Appellee,

versus

UNITED STATES OF AMERICA, Appellee-Appellant,

(AND REVERSE TITLE)

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

Before TUTTLE, Chief Judge, EDGERTON,* and SMITH,** Circuit Judges.

JUDGMENT—July 21, 1965

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

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* Senior Circuit Judge of the D. C. Circuit, sitting by designation.

** Of the Third Circuit, sitting by designation.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court on the appeal by the Florida East Coast Railway Company and on the cross-appeal of the United States, in this cause be, and the same is hereby, affirmed.

Issued as Mandate: Aug 12 1965

[fol. 917] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 918]

SUPREME COURT OF THE UNITED STATES

No. .....—October Term, 1965

UNITED STATES, Petitioner,

v.

FLORIDA EAST COAST RAILWAY CO.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—October 15, 1965

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Nov. 18, 1965.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 15th day of October, 1965.

[fol. 919]

SUPREME COURT OF THE UNITED STATES

No. .....—October Term, 1965

UNITED STATES,

v.

FLORIDA EAST COAST RAILWAY CO., et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—November 18, 1965

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby further extended to and including Nov. 29, 1965.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 18th day of November, 1965.

[fol. 920]

SUPREME COURT OF THE UNITED STATES

No. 750—October Term, 1965

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, et al., Petitioners,

v.

FLORIDA EAST COAST RAILWAY COMPANY.

ORDER ALLOWING CERTIORARI—January 24, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

This case is consolidated with Nos. 782 and 783 and a total of two hours is allotted for oral argument. The United States is to open the argument and direct itself first to issues raised in No. 782.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Fortas took no part in the consideration or decision of this petition.

[fol. 921]

SUPREME COURT OF THE UNITED STATES

No. 782—October Term, 1965

UNITED STATES, Petitioner,

v.

FLORIDA EAST COAST RAILWAY COMPANY, et al.

ORDER ALLOWING CERTIORARI—January 24, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with Nos. 750 and 783 and a total of two hours is allotted for oral argument. The United States is to open the argument and direct itself first to issues raised in this case.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Fortas took no part in the consideration or decision of this petition.

[fol. 922]

SUPREME COURT OF THE UNITED STATES

No. 783—October Term, 1965

FLORIDA EAST COAST RAILWAY COMPANY, Petitioner,

v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—January 24, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with Nos. 750 and 782 and a total of two hours is allotted for oral argument. The United States is to open the argument and direct itself first to issues raised in No. 782.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Fortas took no part in the consideration or decision of this petition.

EXHIBIT VOLUME

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. 750

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, ET AL., PETITIONERS,

vs.

FLORIDA EAST COAST RAILWAY COMPANY.

No. 782

UNITED STATES, PETITIONER,

vs.

FLORIDA EAST COAST RAILWAY COMPANY, ET AL.

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, PETITIONER,

vs.

UNITED STATES.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 750 PETITION FOR CERTIORARI FILED NOVEMBER 18, 1965
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I. EXHIBITS OFFERED AND ADMITTED AT HEARING OF MAY 26, 27 AND 28, 1964

PLAINTIFF'S EXHIBIT No. 1

Filed: May 26, 1964

ORDER OF RAILROAD TELEGRAPHERS
3860 Lindell Boulevard
St. Louis 8, Mo.

Telephone
Jefferson 3-8321

September 4, 1963

Mr. E. C. Thompson, Executive Secretary
National Mediation Board
Washington, D. C. 20572

File: MB-455

Dear Sir:

Please find attached hereto an application for the mediatory services of your Board, submitted under the provisions contained in Section 5, First, of the Railway Labor Act, in a dispute between the Cooperating Railway Labor Organizations, listed in Appendix No. 1 attached hereto, and the Florida East Coast Railway, resulting from the serving by the Carrier on each of the Organizations listed in Appendix No. 1 of the uniform notice of July 31, 1963, a copy of which is attached to the application, identified as Appendix No. 2.

The uniform notice served by the Carrier on July 31, 1963, proposes the cancellation, effective September 1, 1963, of the Union Shop Agreements now in effect with the named Cooperating Railway Labor Organizations.

The initial conference to discuss the Carrier's proposal was scheduled and held August 29, 1963, attended by the representatives of the parties to the dispute except the American Train Dispatchers Association, but negotiations did not materialize because of the insistence of Carrier's representative that a verbatim record be made of the conference by means of a recorder and that the conference proceedings could not be conducted without such a recording being made. The Organization representatives asserted their inability to bargain in the environment and under the impossible conditions created by the Carrier's representative and as he would not change these conditions to those anticipated and universally obtaining in conducting negotiations under the Railway Labor Act, the conference was terminated. We feel that further attempts at negotiation would have been futile and therefore, invoke the services of the National Mediation Board on the dispute concerning Carrier's proposal.

The National Mediation Board is hereby requested to accept jurisdiction of this dispute and promptly take the necessary action under the Railway Labor

Act to prevent the Carrier from unilaterally placing its proposal into effect.

Yours very truly,

(Signed) G. E. LEIGHTY
Chairman,
Seventeen Cooperating
Railway Labor Organizations

Enclosures

c/c-Messrs R. K. Berg
E. F. Carlough
G. M. Freeman
M. Fox
A. J. Bernhardt
A. Matz
G. M. Harrison
C. L. Dennis
H. C. Crotty
J. Clark
E. S. Miller
M. G. Schoch
J. M. Calhoon
A. J. Hayes
T. W. Gleason
H. Pickett
J. W. Ramsey
T. V. Ramsey
J. W. O'Brien
E. H. Wolfe
J. B. Zink
R. W. Smith
H. Buoy
E. Erickson
Capt. J. E. Bishop
E. Murphy
L. P. Schoene
D. S. Beattie
E. L. Oliver

An Official Record of the U. S. Government. A Document Kept in the Office of the National Mediation Board, Washington, D. C. Certified A True Copy.

(Signed) E. C. THOMPSON
E. C. Thompson
Executive Secretary

Received: Sept. 6, 1963

PLAINTIFF'S EXHIBIT No. 2

Filed: May 26, 1964

CONDITIONS OF EMPLOYMENT APPLYING TO EMPLOYES OF FLORIDA EAST COAST RAILWAY COMPANY

INDEX TO CONDITIONS OF EMPLOYMENT

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III	LEAVES OF ABSENCE.
IV	BULLETINING PROCEDURES.
V	BASIS OF PAY.
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I

Employes will be required to perform any work designated by their supervisors for which they are qualified, titles or classifications of the employe's position in no way restricting such employe from performing any such service.

Jobs will fall in the following classifications with rates of pay applying as indicated below, such classifications being subject to elimination, consolidation or addition by the Railway as requirements of the servide demand.

JOB CLASSIFICATION

JOB TITLE	*STRAIGHT TIME RATE PER HOUR*
Enginehouse Foremen	$3.90
Car Foremen	3.80
Machine Shop Foreman	3.80
Electrical Foremen	3.80
Dispatchers	3.65
Yardmasters	3.65
Maintenance of Equip. Gang Foreman	3.25
Locomotive Engineers (Thru Frt.)	3.05
Locomotive Engineers (Passenger)	2.95
Signal Foremen	2.95
Bookkeepers	2.95
Machine Programmers	2.95
Locomotive Engineers (Local Frt.)	2.90
Locomotive Engineers (Yard)	2.90
Train Conductors (Passenger)	2.90
Yard Foremen	2.90
Accountants	2.90
Train Conductor (Thru Frt.)	2.80
Train Conductor (Local Frt.)	2.80
Welder	2.80
Rate & Division Clerk	2.80

Signalman	2.75
Machine Operator (IBM)	2.75
Rate & Adjustment Clerk	2.75
Voucher Clerk	2.75
Equipment Repairmen	2.70
Machinist	2.70
Carmen	2.70
Sheet Metal Worker	2.70
Electrician	2.70
Boiler Maker	2.70
Blacksmith	2.70
Division Clerk	2.70
Requisition Clerk	2.70
Specialized B & B Foremen	2.65
Specialized Roadway Foremen	2.65
Claim Clerk	2.65
AAR Clerk	2.65
Switchmen	2.60
Maintenance Foremen	2.60
Signalman Helper	2.60
Apprentice First Class	2.60
Account Clerk	2.60
Cashier - Teller	2.60
O.S.& D. Clerk	2.60
Crew Caller	2.60
Purchasing Clerk	2.60
Quotation Clerk	2.60
Ticket Refund Clerk	2.60
Agent Operator Class I	2.60
B & B Gang Foremen	2.55
Roadway Gang Foremen	2.55

Agent Operator, Class III	2.55
Jr. Quotation Clerk	2.55
Stenographer	2.55
Trainmen (Local Frt.)	2.50
Machine Operator, Heavy	2.50
Agents	2.50
Warehouse Foremen	2.50
Ticket Clerk Operator	2.50
Bridgemen	2.45
Carpenters	2.45
General Clerks	2.45
Operators	2.45
Reservation Clerks	2.45
Yard Clerks	2.45
Apprentice Second Class	2.45
Trainmen (Baggagemen-Passenger)	2.40
Trainmen (Thru Freight)	2.40
Machine Operator Light	2.40
Bridge Tender, Class I	2.40
Welder Helpers	2.40
Baggage Clerks	2.40
M/E Shop Helpers	2.40
M/E Helpers	2.40
Ticket Clerks	2.35
Apprentice Third Class	2.35
Equipment Repairman Helper	2.35
Signalman Apprentice	2.35
Trainmen (Flagmen-Passenger)	2.30
Ticket Stock Clerks	2.30
Attachment Clerks	2.30

Stock Clerks	2.30
Apprentice, Fourth Class	2.25
Bridgeman Helpers	2.20
Carpenter Helpers	2.20
Bridge Tender, Class II	2.20
Freight Checkers	2.15
Laborers	2.10
Switchboard Operators	2.10
Messengers	2.10
Station Porters	2.10
Red Caps	2.10
Cooks	2.10
Train Porters	2.00
Train Attendants	2.00
Train Maids	2.00

II

New employes will establish seniority dates as of the first date on which compensated service is performed. Rosters will be established reflecting such seniority dates and will be divided in the following master seniority groups:

I - TRANSPORTATION OPERATING EMPLOYES:
II - MAINTENANCE OF WAY EMPLOYES:
III - MAINTENANCE OF EQUIPMENT EMPLOYES:
IV - OFFICE AND CLERICAL EMPLOYES:
V - STATION AND MISCELLANEOUS EMPLOYES:

Each employe will hold seniority in only one master seniority group, which group will be sub-divided in accordance with job classifications. Employes will be placed on sub-classification seniority lists in accordance with individual qualifications at such time as they demonstrate those qualifications and are approved by the supervisory officer in charge. To qualify for a sub-classification seniority list an employe must acquaint himself with the work and demonstrate his qualifications to the supervisory officer in charge without expense to the Railway.

A seniority date on sub-classification seniority lists will correspond with the seniority date of the individual involved on the master seniority list, i.e., each individual employe having only one seniority date irrespective of the time that he qualifies for entry upon a given sub-classification seniority list. This will not prevent employes from qualifying for two or more sub-classification seniority lists, except that an employe must establish seniority in at least one additional sub-classification during each 5-year period and failing to do so will be barred from establishing seniority in additional sub-classifications. In the event requirements of the service dictate new sub-classification seniority lists may be established or existing sub-classification seniority lists consolidated if necessary dovetailing or establishing of seniority lists to be affected in order to accomplish such changes.

Seniority lists will be published July 1st of each year and be open to protest for a sixty-day (60) period thereafter.

Sub-classification seniority lists will be established as follows:

I—TRANSPORTATION OPERATING EMPLOYES

I-A — Engine Service

I-A-1 — Engineers — Passenger
I-A-2 — Engineers — Road Service
I-A-3 — Engineers — Yard

1-B — Train and Yard Service

I-B-1 — Conductors — Passenger
I-B-2 — Conductors — Road Freight
I-B-3 — Conductors — Yard
I-B-4 — Trainmen — Passenger
I-B-5 — Trainmen — Road Freight
I-B-6 — Trainmen — Yard

II — MAINTENANCE OF WAY EMPLOYES

II-A — Foremen

II-A-1 — Signal Foremen
II-A-2 — Specialized Roadway Foremen
II-A-3 — Specialized B. & B. Foremen
II-A-4 — Roadway Gang Foremen
II-A-5 — B. & B. Gang Foremen

II-B — Mechanics

II-B-1 — Welders
II-B-2 — Signalmen
II-B-3 — Equipment Repairmen
II-B-4 — Heavy Machine Operators
II-B-5 — Bridgemen
II-B-6 — Carpenters
II-B-7 — Light Machine Operators
II-B-8 — Bridge Tenders Class I

II-C — Helpers

II-C-1 — Signalman Helpers
II-C-2 — Welders Helpers
II-C-3 — Equipment Repairman Helpers
II-C-4 — Carpenter Helpers
II-C-5 — Bridgeman Helpers
II-C-6 — Bridge Tenders Class II
II-C-7 — Signalman Apprentice

II-D — Laborers

II-D-1 — Laborers
II-D-2 — Cooks

III — MAINTENANCE OF EQUIPMENT EMPLOYES

III-A — Foremen

III-A-1 — Enginehouse Foremen
III-A-2 — Car Foremen
III-A-3 — Machine Shop Foremen
III-A-4 — Electrical Foremen
III-A-5 — Gang Foremen

III-B — Mechanics

III-B-1 — Machinists
III-B-2 — Carmen
III-B-3 — Sheet Metal Workers
III-B-4 — Electricians
III-B-5 — Boilermakers
III-B-6 — Blacksmiths

III-C — Apprentice Mechanics

III-C-1 — Machinist Apprentices
III-C-2 — Carmen Apprentices
III-C-3 — Sheet Metal Worker Apprentices

III-C-4 — Electrician Apprentices
III-C-5 — Mechanics Apprentices

III-D — Helpers
III-D-1 — Helpers and Shop Helpers (All Classifications)

III-E — Laborers
III-E-1 — Laborers (All Classifications)

IV — OFFICE AND CLERICAL EMPLOYES

IV-A — Transportation
IV-A-1 — Dispatchers
IV-A-2 — Yardmasters
IV-A-3 — Account Clerk
IV-A-4 — Cashier
IV-A-5 — O.S. & D. Clerk
IV-A-6 — Crew Caller
IV-A-7 — Agent-Operator — Class I
IV-A-8 — Agent-Operator — Class II
IV-A-9 — Stenographer
IV-A-10 — Agent
IV-A-11 — Bill Clerk
IV-A-12 — Warehouse Foreman
IV-A-13 — Ticket Clerk-Operator
IV-A-14 — General Clerk
IV-A-15 — Operator
IV-A-16 — Yard Clerk
IV-A-17 — Baggage Clerk
IV-A-18 — Ticket Clerk
IV-A-19 — Freight Checker
IV-A-20 — Switchboard Operator
IV-A-21 — Messenger

IV-B — Accounting

IV-B-1 — Machine Programmer
IV-B-2 — Accountant
IV-B-3 — Rate and Division Clerk
IV-B-4 — Machine Operator (IBM)
IV-B-5 — Bookkeeper
IV-B-6 — Voucher Clerk
IV-B-7 — Division Clerk
IV-B-8 — Rate Clerk
IV-B-9 — Claim Clerk
IV-B-10 — Account Clerk
IV-B-11 — Stenographer
IV-B-12 — General Clerk

IV-C — Traffic

IV-C-1 — Rate and Adjustment Clerk
IV-C-2 — Quotation Clerk
IV-C-3 — Ticket Refund Clerk
IV-C-4 — Jr. Quotation Clerk
IV-C-5 — Stenographer
IV-C-6 — General Clerk
IV-C-7 — Reservation Clerk
IV-C-8 — Ticket Stock Clerk
IV-C-9 — Attachment Clerk

IV-D — Maintenance of Way, Maintenance of Equipment and Stores

IV-D-1 — Requisition Clerk
IV-D-2 — A. A. R. Clerk
IV-D-3 — Purchase Clerk
IV-D-4 — Stenographer
IV-D-5 — General Clerk
IV-D-6 — Stock Clerk

V — STATION AND MISCELLANEOUS EMPLOYES

V-A-1 — Station Porters, Red Caps and Laborers
V-A-2 — Train Porters and Train Attendants
V-A-3 — Train Maids

III

Leaves of absence will, upon written request, be granted at the discretion of the Management, if the employe can be spared, provided, however, that, except in cases of personal sickness or disability, employes will not be granted leaves of absence exceeding ninety (90) days in a calendar year. Employes on leave of absence account personal sickness or disability, supported by certificate of reputable physician if requested by the Management, will be granted leave to the extent dictated by the sickness or disability involved, but employes on leave account sickness or disability engaging in outside employment will forfeit their employment relationship with the Railway except in cases of the Chief Medical Examiner of the Railway barring an employe for physical reasons.

Employes returning to service from leave of absence must notify the proper authority not less than twenty-four (24) hours before reporting time for their runs or jobs.

IV

New runs or jobs and permanent vacancies will be

advertised for a period of five (5) calendar days including date of advertisement. Assignment will be made at 12:01 P.M. on the sixth (6th) day with the senior qualified employe, who has made written application, being assigned thereto. Bids will be accepted only from those employes who have seniority in the sub-classification in which the run, job or vacancy is classified, the bulletin to designate such sub-classification. When the effective date of the run, job or permanent vacancy is known sufficiently in advance, advertisement will be issued, if practicable, so that bids may close prior to the effective date. When not advertised in advance, runs, jobs or permanent vacancies during the period of advertisement will be filled by a senior qualified applicant not holding a regular assignment. When it is known in advance that a vacancy will exist for thirty (30) days or more it will be advertised as a permanent vacancy. If an employe requests leave of absence for thirty (30) days or more and returns to service before expiration of the thirty-day (30) period, he will be required to take the same job he vacated, even though a senior employe has bid the assignment he vacated and all employes who have changed assignments as a result of the vacancy having been advertised as a permanent vacancy will return to their former assignments, except as specifically provided herein below.

In the event no applications are received, the senior qualified employe holding seniority in the sub-classification involved, not holding a run, job or vacancy, will be forced to the run, job or vacancy and will remain thereon until displaced through the exercise of seniority or by bidding upon and becoming assigned to another permanent run, job or vacancy.

If an employe is absent on authorized leave during the entire time any run, job or vacancy is advertised for assignment, or during the time that a temporary vacancy is open for application and, for that reason, did not apply therefore, upon reporting for service he may, if qualified and holds seniority in the sub-classification involved, displace a junior employe who has been assigned to such run, job or vacancy during his absence, provided he makes application within four (4) days after reporting and then only if he does not otherwise exercise his seniority rights. A junior employe displaced as a result may then exercise his seniority in like manner.

If an employe not holding a regular assignment does not bid upon, or if he bids upon and is the successful applicant but does not protect, a vacancy, run, or job for any reason except for having been on authorized leave of absence, he will be barred from displacing the junior employe who bids in the assignment until such time as he has displacement rights from another regular assignment.

Temporary vacancies of less than thirty (30) days' duration will not be advertised. Such vacancies will be filled by the senior qualified employe holding seniority in the sub-classification involved who is not regularly assigned. Such employe will remain thereon until he is displaced through the exercise of seniority, or he bids upon and becomes assigned to another permanent run, job or vacancy, or the temporary assignment expires. At the expiration of such temporary assignment, the incumbent will be permitted to exercise seniority over any junior employe in the sub-classification in which he holds seniority holding a run, job or

vacancy, either permanent or temporary, which develops during the period he was on the temporary assignment.

Unassigned employes who have not performed service with the Railway for a period of thirty (30) days or more will be given seven (7) calendar days in which to report for service from the time of recall with the understanding that the Management has the right to use any junior employe available until the recalled employe reports for duty, without penalty accruing to the Railway. Any unassigned employe who has performed service with the Railway within a period of thirty (30) days will be required to report for duty when notified within twenty-four (24) hours, unless leave of absence is granted, or forfeit his seniority with the Railway.

Employes entitled to bulletined positions will be allowed thirty (30) working days in which to qualify, and failing shall retain all their seniority rights, may bid on any bulletined position, but may not displace any regularly assigned employe. When it is definitely determined that the employe cannot qualify (the supervisory officer to be the determining judge) he may be removed before the expiration of thirty (30) working days. After an employe has been assigned to, and performed actual service on, a position in excess of thirty (30) working days, disqualification from the position may be effected only if a formal investigation is conducted and the evidence adduced thereby supports such action.

Positions may be established or abolished at any time, consistent with the requirements of the service.

V

Basis of pay on all runs, jobs or assignments will be on an hourly rate, eight, (8) hours, excluding meal period where granted, constituting a day's work, except as otherwise specifically provided in these Conditions of Employment. Work in excess of eight (8) hours in one tour of duty on each day or regular assignment, or in extra service, will be paid for at time and one-half rate.

Regular assignments will be on a five (5) or six (6) day work week basis in accordance with the requirements of the service. Rest days will be on Saturday and/or Sunday, if conditions permit.

VI

When forces are reduced, fitness, ability and seniority will prevail.

VII

In all service, the time of employes covered by these Conditions of Employment will commence at the time they are required to report for duty and shall continue until they are relieved from duty, except as otherwise specifically provided.

VIII

Employes laid off in reduction of force will retain their seniority and will be returned to service in the order of their fitness, ability, qualifications and seniority, provided they file their names and addresses

with the employing officer or other properly designated official at time of lay-off, advise him of any change therein, and report for service promptly, but not later than seven (7) days after being notified by mail at the last address on file. (24 hours if last service performed within a 30-day period.)

IX

Seniority rights may be exercised only in case of vacancy, new positions, reduction in force or when displaced by senior employe, except when returning from leave of absence (See III and IV). Employes displaced, whose seniority rights entitle them to regular positions, shall assert such rights within seven (7) calendar days. Employes who do not possess seniority to displace another employe or who do not assert their displacement rights within the prescribed time limit will be considered as furloughed.

X

The starting times of employes will be governed by the requirements of the service.

XI

Employes will not be disciplined or dismissed without first being given a fair and impartial hearing, except in cases in which the Management considers the offense sufficiently serious the employe involved may be suspended pending hearing and decision, or when the employe admits responsibility in writing and waives hearing. Reprimands and demerits and further action thereon will be applied in the manner prescribed below.

At the hearing the employe involved may be assisted by an employe of his choice working in his craft on this Railway. The hearing will be held within ten (10) calendar days from the date the employe is charged with the offense, or held out of service. Decision will be rendered within ten (10) calendar days after completion of the investigation and hearing. Written notice of the hearing and purpose thereof will be sent to the employe at least forty-eight (48) hours in advance of the time set for the hearing to permit him to have witnesses and representatives of his choice present. The time limits provided in this paragraph may be extended by mutual consent.

A transcript of all evidence recorded at the hearing will be furnished the employe, if disciplined, upon his request.

If the charge against the employe is not sustained it shall be stricken from the record. If by reason of such unsustained charge the employe has been removed from the position he held, reinstatement will be made to his former position, provided a senior employe, because of force reduction, or under his displacement rights, has not been awarded such former position in the interim, or it has not been abolished, and payment of wages lost will be allowed on the basis of straight time for each working day held out of service, less any amount he may have earned in or out of the service of the Railway during such time.

If the position has been abolished or if a senior employe, because of force reduction or under his displacement rights, has been awarded the position of the reinstated employe the latter shall place himself

in a position in accordance with his seniority rights in the same manner that he would have exercised such rights had he not been out of the service, and will be compensated for the net wage loss at the rate of that position, less any amount he may have earned in or out of the service of the Railway during such time.

If an employe considers himself unjustly disciplined, or is dissatisfied with a decision he has the right to appeal in succession up to and including the highest official designated by the Management to handle such cases, provided written notice of appeal is given the official rendering the decision appealed from, within thirty (30) calendar days from the date of the issuance of the decision.

If no such appeal is made within that time the case will be considered closed and thereafter barred.

The Railway will not be expected to have present at an investigation employe witnesses who have no personal knowledge of the matter being investigated.

Efficiency will be maintained by reprimand, demerits, or dismissal from the service.

An individual account will be opened with each employee on a record to be kept especially for that purpose in the Office of the Assistant Vice President and Director of Personnel; an entry will be made on such record in each case of neglect of duty, violation of the rules or of good practices, accidents, improper conduct, etc., the same to be determined by the supervisory officer in charge.

Good judgment in emergencies, acts of heroism, loyalty to the service, and other meritorious conduct, will be made matter of record and fully considered in determining the standard of the employee. The record will also be taken into account when the question of promotion is under consideration. A perfect record is one against which no unfavorable entry has been made. A clear record is one on which unfavorable entries have been canceled.

Any employe may examine his own record at the Assistant Vice President and Director of Personnel's Office during business hours, but the record will be open to none other excepting the Division and General Officers of the Company. If not practicable for an employee to visit the office, a transcript of his record will be sent him upon personal request.

A reprimand or demerit will not be noted against an employe's record without written notice to him.

Not less than five demerits will be assessed, and in multiples of five, but in no case to exceed thirty demerits for any one offense. Reprimands and demerits placed against the record of an employee, will be cancelled by satisfactory service for various periods, as follows:

(a) A reprimand will be cancelled by a clear record of three months.
(b) Five demerits will be cancelled by a clear record of six months.
(c) Ten demerits will be cancelled by a clear record of nine months.

(d) Thirty demerits will be cancelled by a clear record of one year.
(e) Sixty demerits will be cancelled by a clear record of eighteen months.

An accumulation of ninety (90) demerits will be taken as evidence that the employe is not rendering satisfactory service, and suspension from duty will follow the actual notice of the entry of the ninetieth or more demerit, at which time the entire record will be reviewed and such further action taken as the circumstances warrant. If on appeal of any demerit entry it should be determined that the demerits were not justified, reducing the total below ninety, the employe will be reinstated to the service with pay for any time lost, less other earnings during that period.

Disloyalty, dishonesty, desertion, intemperance, immorality, insubordination, incompetency, wilful neglect, inexcusable violation of rules resulting in endangering or destroying Company property, jeopardizing the safety of employes or public, making false statements, or concealing facts concerning matters under investigation, will, as heretofore, subject the offender to summary dismissal.

No change will be made in the practice of consideration of offenses by the supervisory officer in charge and, ordinarily, no action will be taken until investigation is completed. In cases of intoxication on duty, insubordination, or vicious conduct, employes will be taken out of the service pending final decision.

Supervisory officers will issue bulletins once a month, posting them at designated locations. These

bulletins are intended to be educational. They will give a brief account of certain violations that resulted in entries being made on records, stating how the trouble or damage could have been avoided — omitting names of persons at fault. Employes are requested to study these bulletins with care, that they may profit by the experience of others.

XIII

An employe attending court, inquests, investigations or hearings under instructions from the Railway, as witnesses for Railway, will be paid for each day so held the equivalent of his regular assigned hours at pro rata rate for assigned work days and actual time not exceeding eight hours at pro rata rate for assigned rest days, plus actual expenses while away from home. Extra or unassigned employes attending court, inquests, investigations or hearings under instructions from the Railway, as witnesses for the Railway, will be allowed a minimum day at the rate of the position on which service was last performed prior to such attendance for each calendar day used as a witness. Free transportation to away-from-headquarters point will be furnished but pay for deadheading will not be allowed. Fees and mileage accruing will be assigned to the Railway. This condition of employment has no application to an employe instructed by the Railway to attend a hearing of charges against him.

Each Employe covered by these Conditions of Employment will be given equal consideration in the granting of free transportation.

XIV

Instructions of supervisory officers of the Railway to employes to undergo physical or mental examinations shall be promptly complied with, the company to pay for any such examinations made at its direction. The Company reserves the right to select its own medical examiner or physician. No compensation shall be due an employe for undergoing examination.

XV

Effective with the calendar year 1963, an annual vacation of one (1) week with pay, or pay in lieu thereof, will be granted to each employe of the Florida East Coast Railway Company who renders compensated service as an employe of the Florida East Coast Railway Company on not less than one hundred sixty (160) days during the preceding calendar year with qualifying days being computed on the basis of one (1) day for each tour of duty of eight (8) hours and overtime if any.

Effective with the calendar year 1963, an annual vacation of two (2) weeks with pay, or pay in lieu thereof, will be granted to each employe of the Florida East Coast Railway Company who renders compensated service as an employe of the Florida East Coast Railway Company on not less than 160 days during the preceding calendar year and who has five (5) or more years of continuous service with the Florida East Coast Railway Company and has rendered compensated service on not less than 800 days in said five year period with qualifying days being computed on the basis of one (1) day for each tour of duty of eight (8) hours and overtime if any.

Effective with the calendar year 1963, an annual vacation of three (3) weeks with pay, or pay in lieu thereof, will be granted to each employe of the Florida East Coast Railway Company who renders compensated service as an employe of the Florida East Coast Railway Company on not less than one hundred sixty (160) days during the preceding calendar year and who has fifteen (15) or more years of continuous service with the Florida East Coast Railway Company and has rendered compensated service on not less than 2,400 days in said fifteen year period with qualifying days being computed on the basis of one (1) day for each tour of duty of eight (8) hours and overtime if any.

Continuous employment is broken by voluntary resignation, discharge for cause, or any other voluntary separation from the service, except for retirement.

The vacation period due in any one year must be taken during that year — vacation periods being neither accumulative nor transferable.

The Company reserves the right to schedule the vacation period for each employe, as well as to generally administer the vacation plan, in accordance with the above provisions, with the understanding, of course, that vacation periods will be scheduled to the greatest extent possible, commensurate with the requirements of the service, on the seniority principle.

XVI

The amount of vacation pay for the vacation period of one (1) year employe shall be the equivalent of for-

ty (40) hours' pay at the rate of the last service performed prior to the beginning of the vacation period, or 1/52 of his prior year's earnings, whichever is the greater.

The amount of vacation pay for the vacation period of each five (5) year employe shall be the equivalent of eighty (80) hours' pay at the rate of the last service performed prior to the beginning of the vacation period, or 1/26 of his prior year's earnings, whichever is the greater.

The amount of vacation pay for the vacation period of each fifteen (15) year employe shall be the equivalent of 120 hours' pay at the rate of the last service performed prior to the beginning of the vacation period, or 3/52 of his prior year's earnings, whichever is the greater.

XVII

All rates of pay appearing in Item No. 1 have been adjusted to reflect payment, at straight time rate, for the following holidays:

New Year's Day
Washington's Birthday
Decoration Day
Fourth of July
Labor Day
Thanksgiving Day
Christmas Day

NOTE: When any of the above holidays falls on Sunday, the day observed by the State, Nation or by proclamation shall be considered the holiday.

No allowances will be due for holiday pay unless service is performed on a designated holiday, in which event the employe performing the service will be allowed pay at the time and one-half rate of the position on which service is performed, the Railway having the right to blank any job on any designated holiday without incurring penalties on behalf of the employes involved.

XVIII

An applicant for employment, who enters the service of the Railway, will be accepted or rejected within forty-five (45) days from the date he establishes seniority. If not notified to the contrary within the time stated, it will be understood his application has been accepted. In the event of applicant giving materially false information, the forty-five (45) day time limit will not apply.

NON-OPERATING CRAFTS

N-1

Where service is intermittent, eight (8) hours' actual time on duty within a spread of twelve (12) hours shall constitute a day's work. Employes filling such positions shall be paid overtime for all time actually on duty or held for duty in excess of eight (8) hours from the time required to report for duty to the time of release within twelve (12) consecutive hours and also for all time in excess of twelve (12) consecutive hours computed continuously from the time first required to report until final release. Time shall be counted as continuous service in all cases where the

interval of release from duty does not exceed one (1) hour.

Employes will be paid not less than eight (8) hours within a spread of twelve (12) consecutive hours.

N-II

The regular meal period shall not be less than thirty (30) minutes or more than one (1) hour, except in cases of emergency, or where assignments require eight (8) hours of continuous labor, in which case not to exceed twenty (20) minutes will be allowed therein in which to eat, without deduction in pay.

N-III

Employes notified or called to perform work not continuous with the regular work period will be allowed a minimum of two (2) hours at time and one-half rate for two (2) hours' work or less, and if held on duty in excess of two hours time and one-half will be allowed on the minute basis. Each call to duty after being released shall be a separate call.

Employes required to report for duty before the assigned starting time and who continue to work through the regular shift, shall be paid two (2) hours at time and one-half rate for two (2) hours' work or less, and at the time and one-half rate thereafter on the minute basis for the time required to work in advance of the regular starting time.

OPERATING CRAFTS

O-I

Employes employed in any class of service may be required to perform any other class of service in a day or trip, the highest rated service performed to be the applicable rate for the entire day or trip. The consist of crews will be determined by Management in accordance with the requirements of the service.

O-II

Employes in pool freight and in unassigned service held at other than home terminal will be paid on the minute basis for the actual time so held after the expiration of sixteen hours from the time relieved from previous duty at the rate per hour paid them for the last service performed. If held sixteen hours after the expiration of the first twenty-four hour period from the time relieved, they will be paid for the actual time so held during the next succeeding eight hours, or until the end of the second twenty-four hour period and similarly for each twenty-four hour period thereafter. Should an Employe be called for service or ordered to deadhead after pay begins, held away-from-home terminal time shall cease at the time pay begins for such service or deadheading. Payments accruing hereunder shall be paid for separate and apart from pay for the subsequent service or deadheading.

The Railway will designate a home terminal for each crew in pool freight and in unassigned service.

EXAMPLES

Question 1. Crew goes on duty after having been held twenty-two (22) hours at away-from-home terminal and makes a freight run in six (6) hours. What are they entitled to?

Answer. Crew is entitled to pay for 6 hours at the rate per hour of the last service performed, and 8 hours for the service trip.

Question 2. A crew is called for duty at away-from-home terminal after being held twenty-four (24) hours, and then makes a freight run in six (6) hours. What are they entitled to?

Answer. The crew having been held for a complete 8 hour period, compensation earned under the Held-Away-From-Home Terminal provision, and for the service trip should be paid separately. Crew is, therefore, entitled to 8 hours at the rate per hour paid them for the last service performed, and 8 hours for the service trip.

Question 3. After being held forty-three (43) hours at away-from-home terminal, a crew goes on duty and makes a freight run to their home terminal in six (6) hours. What is crew entitled to?

Answer. Crew is entitled to pay for 8 hours held away-from-home terminal time, at the rate per hour paid them for the last service performed, for the first 24-hour period; 3 hours at the same rate for the second period beginning with the 41st hour; and 8 hours for the service trip.

Question 4. After being held twenty-three (23) hours at away-from-home terminal, a crew goes on duty and makes a freight run to their home terminal in nine (9) hours. What is crew entitled to?

Answer. Crew is entitled to pay for 7 hours at the rate per hour paid them for the last service performed, and 8 hours pro rata and 1 hour overtime for the service trip.

There are five (5) passenger crews assigned to cover a certain number of scheduled passenger trains, but these crews are in a pool and worked first-in first-out.

Question. Can these crews claim time at the away-from-home terminal under the Held-Away-From-Home Terminal provision?

Answer. No; as crews are not in pool freight or in unassigned service.

O-III

Road crews and extra or unassigned yard crews will be called for service, it being incumbent upon each employe involved to furnish the Management with a telephone number at which he can be contacted for calls for duty as all calls for service will be made by telephone. Details involving procedural arrangements for the calling of crews will be effectuated by the Management.

O-IV

When road or yard service employes are called and

perform no service other than to register, check bulletin book, get supplies, working clothes, etc., preparatory to going on duty, they will be paid a minimum of four (4) hours at pro rata rate in the class of service for which called and stand first out. If held more than (4) hours they will be paid a minimum day in the class of service for which called and stand last out. In order to receive pay an employe must remain where he can be used until he is notified that his services will not be required. Payments will not apply when an employe is called and he is later notified before leaving his place of residence that the call is cancelled. Payments will not affect the turn or standing of assigned employes.

O-V

Train and engine service employes deadheading under orders of the Railway will be allowed pay for actual time consumed, at one-half the rate of the service to which being deadheaded, except that a maximum of eight (8) hours will be allowed for any one deadhead trip. Deadhead trips are to be paid as separate items and not combined with service pay unless the deadhead trip is an integral part of the service trip, in which event deadhead and service pay will be paid as one item. This condition of employment will not apply to employes deadheading for service as yardmen nor to any employes deadheading to exercise seniority rights.

O-VI

Extra lists for employes will be established at points designated by the Management.

Extra employes will be run first-in and first-out of terminals except that they will take the turn of the employes whose vacancies they are called to fill.

Extra employes will be governed by instructions promulgated by the Railway as to registering for service, marking up on the extra boards, return from leave of absence or furlough, etc.

The Railway will be divided into a designated number of "Selective Work Districts" for extra board employes, each extra board man to be permitted to elect the "Selective Work District" on which he desires to work, commensurate with his seniority standing and the requirements of the service, and will be called for the service on a first-in first-out basis, except as otherwise provided in these working conditions, for service originating in that "Selective Work District". Procedural details will be promulgated and published by the Management.

O-VII

A 30 minute meal period, without pay, will be allowed all yard and local freight crews. On through freight and passenger runs, where continuous service is required, employes will be expected to eat en route and there will be no meal period provided. Those crews granted meal periods will make pre-arrangements with the Dispatcher or Yardmaster in charge.

PLAINTIFF'S EXHIBIT No. 3

Filed: May 26, 1964

FLORIDA EAST COAST RAILWAY COMPANY

St. Augustine, Florida
September 25, 1963

CERTIFIED MAIL—Return Receipt Requested
Deliver to Addressee Only

Mr. D. G. Lemmon, General Chairman
Brotherhood of Locomotive Engineers
P. O. Box 1184
Savannah, Georgia

Mr. H. O. Van Arsdall, Sr., General Chairman
Brotherhood of Railroad Trainmen
3030 N.W. 2nd Avenue
Miami 37, Florida

Mr. T. C. Bolin, General Chairman
Order of Railroad Conductors and Brakemen
4728 Sappho Avenue
Jacksonville, Florida

Mr. W. T. Kitt, Acting General Chairman
Brotherhood of Locomotive Firemen and Enginemen
1114 Magnolia Street
New Smyrna Beach, Florida

Gentlemen:

We hereby give notice pursuant to the provisions of

the Railway Labor Act, as amended, that effective October 26, 1963, the Agreement attached hereto shall be made effective, superseding all other rules, agreements and understandings in conflict therewith.

Where, in relation to any of the Railway's proposed rules, no agreement, rule, regulation, interpretation or practice exists which imposes the limitations or restrictions which would be eliminated by such proposed rules, the fact that the subject matter is included in this Uniform Working Agreement is n o t to be construed as an admission that such limitation or restriction exists on this Carrier.

It is our desire that conference on this proposal be held at the earliest practicable date and I suggest that the initial conference be held at 10:00 A.M., Monday, October 21, 1963, in the Meeting Room of the Monson Motor Lodge, 32 Bay Street, St. Augustine, Florida. In accordance with the provisions of Section 6 of the Railway Labor Act, please acknowledge receipt of this notice and advise if the proposed time, date and place for holding the initial conference are agreeable to you.

Sincerely yours,

(Signed) R. W. Wyckoff
Assistant Vice President and
Director of Personnel

RWW/p
Encl

THE
UNIFORM WORKING AGREEMENT
Between
FLORIDA EAST COAST RAILWAY COMPANY
And
EMPLOYES

Represented By
Brotherhood of Locomotive Engineers
Brotherhood of Railroad Trainmen
Order of Railway Conductors and Brakemen
Brotherhood of Locomotive Firemen and Enginemen

PREAMBLE

Except to the extent specifically restricted or limited by this Agreement the following rights of Management are possessed and shall be exercised exclusively and solely by the Florida East Coast Railway Company:

It shall be the sole right and prerogative of the Management to hire, lay off, promote, demote, transfer, suspend or discharge for cause, maintain discipline, establish, change and require observance of Company rules and regulations, and maintain efficiency of the employes. In addition, the Management has the exclusive duty and right to manage its business, to classify and direct the working force, to assign and reassign duties to jobs, determine procedural methods and equipment to be utilized, schedule the work week and work, determine the competence of employes and the number of employes to be assigned to a crew, job, task, station or post of duty and the number to be employed or retained in employment and to fix the start-

ing times of jobs. There shall be no obligation on the part of the Management to continue any job and the Management may consolidate or re-organize or discontinue jobs or departments, and set up new departments; and create new job classifications and/or seniority sub-classifications. The foregoing enumeration of Management's rights shall not be deemed to exclude other functions not specifically set forth, the Management, therefore, retaining all rights to plan direct and control operation of its business not otherwise specifically covered by this Agreement. A management decision not in violation of this Agreement, on any right of management or on any matter stated in the contract to be in its judgment, shall not be the basis for grievance or claim.

ARTICLE I

SCOPE.

1. These rules shall govern rates of pay, rules and working conditions of employes assigned by the Carrier to job classifications listed in paragraph 4. (The key number appearing in the column opposite each job classification identifies the representing labor Organization.

2. Employes covered by this Agreement shall perform any work assigned them by the Carrier, including work not normally performed by them in the job classifications to which the Carrier has assigned them. Assignment of an employee to work not normally performed by him in the job classification to which the Carrier has assigned him shall not be a grievance processable under these rules, and shall not constitute a

dispute involving interpretation or application of these rules subject to redress in any forum, or by any means apart from processing grievances under these rules.

3. Nothing in these rules shall limit, nor be construed to restrict or suppress, the right of the carrier to contract work (including work normally performed by employes assigned by the Carrier to job classifications listed in, or added to, paragraph 4) to independent contractors of the Carrier's sole selection.

4. Job classifications and rates of positions covered by this Agreement are: (These job classifications may be eliminated, consolidated or added to by the Railway as the requirements of the service demand.)

JOB CLASSIFICATION

Job Title	*Straight Time Rate Per Hour*	*Representing Organization — (See Appendix "A" for key)*
Locomotive Engineers (Thru Frt.)	$ 3.05	1
Locomotive Engineers (Passenger)	2.95	1
Locomotive Engineers (Local Frt.)	2.90	-
Locomotive Engineers (Yard)	2.90	1
Train Conductors (Passenger)	2.90	3
Yard Foremen	2.90	2
Train Conductor (Thru Frt.)	2.80	3
Train Conductor (Local Frt.)	2.80	3

Switchmen	2.60	2
Hostlers	2.55	4
Trainmen (Local Frt.)	2.50	2
Trainmen (Baggagemen-Passenger)	2.40	2
Trainmen (Thru Freight)	2.40	2
Trainmen (Flagmen-Passenger)	2.30	2

ARTICLE II

SENIORITY.

(a) Seniority date for new employes will be established as of the date of entering the service. The date of "entering the service" will be the date on which an employe qualifies for service.

Existing seniority rosters will be dovetailed to create the following master seniority group:

I — TRANSPORTATION OPERATING EMPLOYES.

Each employe will hold seniority in the master seniority group. *(See exception.) Classifications of the master seniority group will be made in accordance

*NOTE: Transportation Operating Employes may additionally qualify in the Yardmaster sub-classification of the "Office and Clerical Employes" master seniority group of employes covered by Agreement with other labor Organizations on this Railway.

with job classifications. Employes will be placed on sub-classification seniority lists in accordance with their individual qualifications at such time as they demonstrate those qualifications and are approved by the supervisory officer in charge. To qualify for a sub-classification seniority list, an employe must acquaint himself with the work and demonstrate his qualifications to the supervisory officer in charge without expense to the Railway. The Railway will give those desiring to qualify for another sub-classification seniority list an opportunity to learn the work and requirements of such group.

(b) A Seniority date on sub-classification seniority lists will correspond with the seniority date of the individual involved on the master seniority list, i.e., each individual employe having only one seniority date irrespective of the time that he qualifies for entry upon a given sub-classification seniority list. This will not prevent employes from qualifying for two or more sub-classification seniority lists, except that an employe must establish seniority in at least one additional sub-classification during each 5-year period and failing to do so will be barred from establishing seniority in additional sub-classifications.

(c) The Railway may, as requirements of the service dictate, establish new sub-classification seniority lists or may consolidate existing sub-classification seniority lists.

When consolidations are made, a consolidated sub-classification seniority list will be issued, dovetailing the employes in seniority sequence in accordance with their qualifications. When divisions are made a sep-

arate sub-classification seniority list for each sub-classification will be issued, listing employes in seniority sequence according to their qualification on each new sub-classification.

(d) Seniority lists will be published July 1 of each year and will be open to protest for a period of sixty (60) days from date of posting and, upon presentation of proof of error by an employe, or his representative, such error will be corrected. Seniority dates of all employes shown will be considered as permanently established, except as may be corrected as a result of protest filed within the sixty (60) day period after posting.

(e) An employe of the Railway covered by this Agreement promoted to an excepted or official position with the Railway, or accepting such position with one of the Organizations parties hereto, will retain his seniority rights provided such rights are exercised within ninety (90) days of the date that he is released from such official position, unless he obtains additional leave in accordance with the provisions of Article IV.

(f) Sub-classification seniority lists are hereby established as follows:

I — TRANSPORTATION OPERATING EMPLOYES

I-A — Engine Service

I-A-1 — Engineers — Passenger
I-A-2 — Engineers — Road Service
I-A-3 — Engineers — Yard

I-B — Train and Yard Service
I-B-1 — Conductors — Passenger
I-B-2 — Conductors — Road Freight
I-B-3 — Conductors — Yard
I-B-4 — Trainmen — Passenger
I-B-5 — Trainmen — Road Freight
I-B-6 — Trainmen — Yard

ARTICLE III

WORK STOPPAGES

In the event any dispute shall not be resolved by recourse to the procedures prescribed by the Railway Labor Act of 1926, as amended from time to time, it is agreed that no work stoppage shall occur unless, and until, a secret ballot shall have been taken of all employees represented by the contracting labor Organization that is party to the dispute and such ballot, supervised by a representative of the Carrier and by a representative of the contracting labor Organization, establishes that a majority of the employees represented by the contracting labor Organization has voted to stop work. If any such work stoppage occurs, secret ballots shall thereafter be taken in the manner described, not less frequently than once each thirty (30) calendar days dating from commencement of the work stoppage, to determine whether a majority of the employes represented by the contracting labor Organization has voted to continue the work stoppage (in which case it shall continue), or has voted to terminate the work stoppage (in which case it shall cease, and all of such employes shall return to work under the provisions of this agreement and in accordance with their seniority).

ARTICLE IV

LEAVE OF ABSENCE

(a) Leaves of absence will, upon written request, be granted at the discretion of the Management, if the employe can be spared, provided, however, that, except in cases of personal sickness or disability, employes will not be granted leaves of absence exceeding ninety (90) days in a calendar year. Employes on leave of absence account personal sickness or disability, supported by certificate of reputable physician if requested by the Management will be granted leave to the extent dictated by the sickness or disability involved, but employes on leave account sickness or disability engaging in outside employment will forfeit their employment relationship with the Railway except in cases of the Chief Medical Examiner of the Railway barring an employe for physical reasons.

(b) Employes returning to service after having laid off with permission or from leave of absence must notify the proper authority not less than twenty-four (24) hours before reporting time for their runs or jobs.

ARTICLE V

ADVERTISING RUNS, JOBS OR VACANCIES.

(a) New runs or jobs and permanent vacancies will be advertised for a period of five (5) calendar days including date of advertisement. Assignment will be made at 12:01 P.M. on the sixth (6th) day with the senior qualified employe, who has made written application, being assigned thereto. Bids will be accepted only from those employes who have seniority in the

sub-classification in which the run, job or vacancy is classified, the bulletin to designate such sub-classification. When the effective date of the run, job or permanent vacancy is known sufficiently in advance, advertisement will be issued, if practicable, so that bids may close prior to the effective date. When not advertised in advance, runs, jobs or permanent vacancies during the period of advertisement will be filled by a senior qualified applicant not holding a regular assignment. When it is known in advance that a vacancy will exist for thirty (30) days or more it will be advertised as a permanent vacancy. If an employe requests leave of absence for thirty (30) days or more and returns to service before expiration of the thirty-day (30) period, he will be required to take the same job he vacated, even though a senior employe has bid the assignment he vacated and all employes who have changed assignments as a result of the vacancy having been advertised as a permanent vacancy will return to their former assignments, except as specifically provided herein below.

(b) In the event no applications are received, the senior qualified employe holding seniority in the sub-classification involved, not holding a run, job or vacancy, will be forced to the run, job or vacancy and will remain thereon until displaced through the exercise of seniority or by bidding upon and becoming assigned to another permanent run, job or vacancy.

(c) If an employe is absent on authorized leave during the entire run, job or vacancy is advertised for assignment, or during the time that a temporary vacancy is open for application and, for that reason, did not apply therefor, upon reporting for service he may,

if qualified and holds seniority in the sub-classification involved displace a junior employe who has been assigned to such run, job or vacancy during his absence, provided he makes application within four (4) days after reporting and then only if he does not otherwise exercise his seniority rights. A junior employe displaced as a result may then exercise his seniority in like manner.

(d) If an employe not holding a regular assignment does not bid upon, or if he bids upon and is the successful applicant but does not protect, a vacancy, run, or job for any reason except for having been on authorized leave of absence, he will be barred from displacing the junior employe who bids in the assignment until such time as he has displacement rights from another regular assignment.

(e) Temporary vacancies of less than thirty (30) days' duration will not be advertised. Such vacancies will be filled by the senior qualified employe holding seniority in the sub-classification involved who is not regularly assigned. Such employe will remain thereon until he is displaced through the exercise of seniority, or he bids upon and becomes assigned to another permanent run, job or vacancy, or the temporary assignment expires. At the expiration of such temporary assignment, the incumbent will be permitted to exercise seniority over any junior employe in the subclassification in which he holds seniority holding a run, job or vacancy, either permanent or temporary, which develops during the period he was on the temporary assignment.

(f) Unassigned employes who have not performed service with the Railway for a period of thirty (30) days or more will be given seven (7) calendar days in which to report for service from the time of recall with the understanding that the management has the right to use any junior employee available until the recalled employe reports for duty, without penalty accruing to the Railway. Any unassigned employe who has performed service with the Railway within a period of thirty (30) days will be required to report for duty when notified within twenty-four (24) hours, unless leave of absence is granted, or forfeit his seniority with the Railway.

(g) Employes entitled to bulletined positions will be allowed thirty working days in which to qualify and failing shall retain all their seniority rights, may bid on any bulletined position, but may not displace any regularly assigned employe. When it is definitely determined that the employe cannot qualify (the supervisory officer to be the determining judge) he may be removed before the expiration of thirty (20) working days. After an employe has been assigned to, and performed actual service on, a position in excess of thirty (30) working days, disqualification from the position may be effected only if a formal investigation is conducted under the provisions of Article XIII and the evidence adduced thereby supports such action.

(h) Positions may be established or abolished at any time, consistent with the requirements of the service.

ARTICLE VI

BASIS OF PAY.

Basis of pay on all runs, jobs or assignments will be on an hourly rate, eight (8) hours, excluding meal period where granted, constituting a day's work, except as otherwise specifically provided in this Agreement. Work in excess of eight (8) hours in one tour of duty on each day or regular assignment, or in extra service, will be paid for at time and one-half rate.

Regular assignments will be on a five (5), six (6) or seven (7) day work week basis in accordance with the requirements of the service. Rest days will be on Saturday and/or Sunday, if conditions permit.

ARTICLE VII

REDUCING FORCES.

When forces are reduced, fitness, ability and seniority will prevail.

ARTICLE VIII

BEGINNING AND ENDING OF DAY

In all service, the time of employes covered by this Agreement will commence at the time they are required to report for duty and shall continue until they are relieved from duty, except as specifically provided to the contrary herein.

ARTICLE IX

INCREASING FORCES SUBSEQUENT TO REDUCTION

Employes laid off in reduction of force will retain their seniority and will be returned to service in the order of their fitness, ability, qualifications and seniority, provided they file their names and addresses with the employing officer or other properly designated official at time of lay-off, advise him of any change therein, and report for service promptly, but not later than seven (7) days after being notified by mail at the last address on file.

ARTICLE X

REPRESENTATION.

The term "duly accredited representative" or "accredited representative" as used in this Agreement shall be understood to mean the regularly constituted committee, or officers of organizations parties to this Agreement.

ARTICLE XI

EXERCISE OF SENIORITY

Seniority rights of employes covered by these rules may be exercised only in case of vacancy, new positions, reduction in force or when displaced by senior employe, except as provided in Article IV (b) and Article V (b). Employes displaced, whose seniority rights entitle them to regular positions, shall assert such

rights within seven (7) calendar days. Employes who do not possess seniority to displace another employe or who do not assert displacement rights within the prescribed time limit will be considered as furloughed.

ARTICLE XII

STARTING TIME

The starting times of employes will be governed by the requirements of the service.

ARTICLE XIII

DISCIPLINE

(a) An employe who has established a seniority date will not be disciplined or dismissed without first being given a fair and impartial hearing, except in cases in which the Management considers the offense sufficiently serious the employe involved may be suspended pending hearing and decision, or when the employe admits responsibility in writing and waives hearing. Reprimands and demerits and further action thereon will be applied in the manner prescribed in paragraph (h) of this Article.

(b) At the hearing the employe involved may be assisted by an employe of his choice of his craft within the scope of this Agreement or a duly accredited representative of his Organization. The hearing will be held within ten (10) calendar days from the date the employe is charged with the offense, or held out of service. Decision will be rendered within ten (10) cal-

endar days after completion of the investigation and hearing. Written notice of the hearing and purpose thereof will be sent to the employe at least forty-eight (48) hours in advance of the time set for the hearing to permit him to have witnesses and representatives of his choice present. The time limits provided in this paragraph may be extended by mutual consent.

(c) A transcript of all evidence recorded at the hearing will be furnished the employe, if disciplined, upon his request.

(d) If the charge against the employe is not sustained it shall be stricken from the record. If by reason of such unsustained charge the employe has been removed from the position he held, reinstatement will be made to his former position, provided a senior employe, because of force reduction, or under his displacement rights, has not been awarded such former position in the interim, or it has not been abolished, and payment of wages lost will be allowed on the basis of straight time for each working day held out of service, less any amount he may have earned in or out of the service of the Railway during such time.

(e) If the position has been abolished or if a senior employe, because of force reduction or under his displacement rights, has been awarded the position of the reinstated employe the latter shall place himself in a position in accordance with his seniority rights in the same manner that he would have exercised such rights had he not been out of the service, and will be compensated for the net wage loss at the rate of that position, less any amount he may have earned in or out of the service of the Railway during such time.

(f) If an employe considers himself unjustly disciplined, or is dissatisfied with the decision referred to in paragraph (a) of this Rule, he has the right to appeal in succession up to and including the highest official disignated by the Management to handle such cases, provided written notice of appeal is given the official rendering the decision appealed from, within thirty (30) calendar days from the date of the issuance of the decision. This appeal may be made by himself or his duly accredited representative and shall be governed by the provisions of the Time Limit Rule.

If no such appeal is made within that time the case will be considered closed and thereafter barred.

(g) The Railway will not be expected to have present at an investigation employe witnesses who have no personal knowledge of the matter being investigated.

(h) Efficiency will be maintained by reprimand, demerits, or dismissal from the service.

An individual account will be opened with each employe on a record to be kept especially for that purpose in the Office of the Assistant Vice President and Director of Personnel; an entry will be made on such record in each case of neglect of duty, violation of the rules or of good practices, accidents, improper conduct, etc., the same to be determined by the supervisory officer in charge.

Good judgment in emergencies, acts of heroism, loyalty to the service, and other meritorious conduct, will be made matter of record and fully considered in de-

termining the standard of the employe. The record will also be taken into account when the question of promotion is under consideration.

A perfect record is one against which no unfavorable entry has been made.

A clear record is one on which unfavorable entries have been canceled.

Any employe may examine his own record at the Assistant Vice President and Director of Personnel's Office during business hours, but the record will be open to none other excepting the Division and General Officers of the Company.

If not practicable for an employe to visit the office, a transcript of his record will be sent him upon personal request.

A reprimand or demerit will not be noted against an employe's record without written notice to him.

Not less than five demerits will be assessed, and in multiples of five but in no case to exceed thirty demerits for any one offense.

Reprimands and demerits placed against the record of an employe, will be canceled by satisfactory service for various periods, as follows:

(a) A reprimand will be cancelled by a clear record of three months.
(b) Five demerits will be cancelled by a clear record of six months.

(c) Ten Demerits will be cancelled by a clear record of nine months.
(d) Thirty demerits will be cancelled by a clear record of one year.
(e) Sixty demerits will be cancelled by a clear record of eighteen months.

An accumulation of ninety (90) demerits will be taken as evidence that the employe is not rendering satisfactory service, and suspension from duty will follow the actual notice of the entry of the ninetieth or more demerit, at which time, the entire record will be reviewed and such further action taken as the circumstances warrant. If on appeal of any demerit entry it should be determined that the demerits were not justified, reducing the total below ninety, the provision of ARTICLE XIII (d) will apply.

Disloyalty, dishonesty, desertion, intemperance, immorality, insubordination, incompetency, wilful neglect, inexcusable violation of rules resulting in endangering or destroying Company property, jeopardizing the safety of employes or public, making false statements, or concealing facts concerning matters under investigation, will, as heretofore, subject the offender to summary dismissal.

No change will be made in the practice of consideration of offenses by the supervisory officer in charge and, ordinarily, no action will be taken until investigation is completed. In cases of intoxication on duty, insubordination, or vicious conduct, employes will be taken out of service pending final decision.

Superintendent will issue bulletins once a month, posting them at District and Division terminals. These bulletins are intended to be educational. They will give a brief account of certain violations that resulted in entries being made on records, stating how the trouble or damage could have been avoided — omitting names of persons at fault. Employes are requested to study these bulletins with care, that they may profit by the experience of others.

ARTICLE XIV

TIME LIMITS FOR HANDLING CLAIMS AND GRIEVANCES

(a) Grievances shall be made in writing within sixty (60) days from the date of the occurrence on which the particular grievance is based. If not filed within said sixty (60) day period, the grievance is barred.

(b) Unless claims are made in writing within sixty (60) days of the date of the occurrence on which the particular claim is based, all claims for compensation shall be limited to the thirty (30) day period next prior to the filing of the same and the remainder of the claim outside of the thirty (30) day period shall be barred.

(c) Decisions by subordinate officers shall be made in writing within thirty (30) days from the date grievance or claim is received, or within thirty (30) days from the date of conference if one is had theron, and any appeals therefrom shall be made in writing within thirty (30) days from the date of the decision.

(d) Decisions by the Assistant Vice President and Director of Personnel shall be made in writing, as promptly as possible, and shall be final and binding unless within thirty (30) days after the date of written notice of such decision that Officer is notified in writing that his decision is not accepted.

In the event of such notification all grievances or claims involved in such decisions shall be barred unless referred to the appropriate tribunal provided by law within six months from the date of the decision of the Assistant Vice President and Director of Personnel.

(e) All claims of the Railway against employes for overpayment shall be barred unless the Railway shall give notice of such overpayment to the employe involved within sixty (60) days from the date of making such overpayment.

ARTICLE XV

ATTENDING COURT, INQUESTS, ETC.

An employe attending court, inquests, investigations or hearings under instructions from the Railway, as witnesses for Railway, will be paid for each day so held the equivalent of his regular assigned hours at pro rata rate for assigned work days and actual time not exceeding eight hours at pro rata rate for assigned rest days, plus actual expenses while away from home. Extra or unassigned employes attending court, inquests, investigations or hearings under instructions from the Railway, as witnesses for the Railway, will be allowed a minimum day at the rate of the position

on which service was last performed prior to such attendance for each calendar day used as a witness. Free transportation to away-from-headquarter's point will be furnished but pay for deadheading will not be allowed. Fees and mileage accruing will be assigned to the Railway. This rule has no application to an employe instructed by the Railway to attend a hearing of charges against him.

ARTICLE XVI

FREE TRANSPORTATION

Employees covered by this Agreement and those entirely dependent upon them for support will be given the same consideration in granting free transportation as is granted other employes in the service.

ARTICLE XVII

EXAMINATIONS

Instructions of supervisory officers of the Railway to employes to undergo physical or mental examinations shall be promptly complied with, the Company to pay for any such examinations made at its direction. The Company reserves the right to select its own medical examiner or physician. No compensation shall be due an employe for undergoing examination.

ARTICLE XVIII

VACATIONS

1. (a) Effective with the calendar year 1963, an annual vacation of one (1) week with pay, or pay in lieu thereof, will be granted to each employe of the Florida East Coast Railway Company who renders compensated service as an employe of the Florida East Coast Railway Company not less than one hundred sixty (160) days during the preceding calendar year with qualifying days being computed on the basis of one (1) day for each tour of duty of eight (8) hours and overtime if any.

(b) Effective with the calendar year 1963, an annual vacation of two (2) weeks with pay, or pay in lieu thereof, will be granted to each employe of the Florida East Coast Railway Company who renders compensated service as an employe of the Florida East Coast Railway Company on not less than one hundred sixty (160) days during the preceding calendar year and who has five (5) or more years of continuous service with the Florida East Coast Railway Company and has rendered compensated service on not less than 800 days in said five year period with qualifying days being computed on the basis of one (1) day for each tour of duty of eight (8) hours overtime if any.

(c) Effective with the calendar year 1963, an annual vacation of three (3) weeks with pay, or pay in lieu thereof, will be granted to each employe of the Florida East Coast Railway Company who renders compensated service as an employe of the Florida

East Coast Railway Company on not less than one hundred sixty (160) days during the preceding calendar year and who has fifteen (15) or more years of continuous service with the Florida East Coast Railway Company and has rendered compensated service on not less than 2,400 days in said fifteen year period with qualifying days being computed on the basis of one (1) day for each tour of duty of eight (8) hours and overtime if any.

(d) Continuous employment is broken by voluntary resignation, discharge for cause, or any other voluntary separation from the service.

2. (a) The vacation period due in any one year must be taken during that year — vacation periods being neither accumulative nor transferable.

(b) The Company reserves the right to schedule the vacation period for each employe, as well as to generally administer the vacation plan, in accordance with the above provisions, with the understanding, of course, that vacation periods will be scheduled to the greatest extent possible, commensurate with the requirements of the service, on the seniority principle.

ARTICLE XIX

VACATION PAY

(a) The amount of vacation pay for the vacation period for one (1) year employe shall be the equivalent of forty (40) hours' pay at the rate of the last service performed prior to the beginning of the vacation pe-

riod, or 1/52 of his prior year's earnings, whichever is the greater.

(b) The amount of vacation pay for the vacation period of each five (5) year employe shall be the equivalent of eighty (80) hours' pay at the rate of the last service performed prior to the beginning of the vacation period, or 1/26 of his prior year's earnings, whichever is the greater.

(c) The amount of vacation pay for the vacation period of each fifteen (15) year employe shall be the equivalent of 120 hours' pay at the rate of the last service performed prior to the beginning of the vacation period, or 3/52 of his prior year's earnings, whichever is the greater.

ARTICLE XX

RETIREMENT

(a) Effective six (6) months following the date of this Agreement seniority rights of all employes shall terminate and they shall not be permitted to work as employes of the Railway after the last day of the calendar month in which they attain the age of 70, except that this mandatory retirement age shall be progressively lowered until it is 65, effective July 1, 1968, in accordance with the following schedule:

July 1, 1964 — 69 years of age
July 1, 1965 — 68 years of age
July 1, 1966 — 67 years of age
July 1, 1967 — 66 years of age
July 1, 1968 — 65 years of age

(b) Employes attaining stated ages under the formula cited above shall terminate their seniority rights and they shall not be permitted to work in that capacity after the last day of the calendar month in which the age is attained.

ARTICLE XXI

HOLIDAY PAY

(a) All rates of pay as adjusted, (see Article I) reflect payment, at straight time rate, for the following holidays:

New Year's Day
Washington's Birthday
Decoration Day
Fourth of July
Labor Day
Thanksgiving Day
Christmas Day

NOTE: Should any specified holiday fall on Sunday, the day observed by the State, Nation or by proclamation shall be considered the holiday.

(b) No allowances will be due for holiday pay unless service is performed on a designated holiday, in which event the employe performing the service will be allowed pay at the time and one-half rate of the position on which service is performed.

ARTICLE XXII

HEALTH AND WELFARE BENEFITS AND INSURANCE

All employes covered by this Agreement will be eligible for Employe Health Insurance Benefits. Dependents Health Insurance Benefits and Employe Life Insurance Benefits, said plan to be established and administered by the Management of the Company.

ARTICLE XXIII

NEW EMPLOYES

An applicant for employment, who enters the service of the Railway will be accepted or rejected within forty-five (45) days from the date he establishes seniority. If not notified to the contrary within the time stated, it will be understood his application has been accepted. In the event of applicant giving materially false information, the forty-five (45) day time limit will not apply.

ARTICLE XXIV

ELECTRIC LANTERNS

(a) All employes whose work requires it will equip themselves, at their own expense, with electric lanterns, and, at their own expense, keep the same in good repair, and, when necessary, at their expense, provide renewals of same.

(b) The Railway agrees that it will participate to the extent of 50% of the cost of the batteries and bulbs necessary to service the electric lanterns to be provided by the Employes above.

ARTICLE XXV

SERVICE

Employes employed in any class of service may be required to perform any other class of service in a day or trip, the highest rated service performed to be the applicable rate for the entire day or trip. The consist of crews will be determined by Management in accordance with the requirements of the service.

ARTICLE XXVI

HELD-AWAY-FROM-HOME TERMINAL

Employes in pool freight and in unassigned service held at other than home terminal will be paid on the minute basis for the actual time so held after the expiration of sixteen hours from the time relieved from previous duty at the rate per hour paid them for the last service performed. If held sixteen hours after the expiration of the first twenty-four hour period from the time relieved, they will be paid for the actual time so held during the next succeeding eight hours, or until the end of the second twenty-four hour period and similarly for each twenty-four hour period thereafter. Should an Employe be called for service or ordered to deadhead after pay begins, held away-from-home terminal time shall cease at the time pay begins for such service or deadheading. Payments accruing un-

der this rule shall be paid for separate and apart from pay for the subsequent service or deadheading.

For the purpose of applying this rule, the railway will designate a home terminal for each crew in pool freight and in unassigned service.

EXAMPLES

Question 1. Crew goes on duty after having been held twenty-two (22) hours at away-from-home terminal and makes a freight run in six (6) hours. What are they entitled to?

Answer. Crew is entitled to pay for 6 hours at the rate per hour of the last service performed, and 8 hours for the service trip.

Question 2. A crew is called for duty at away-from-home terminal after being held twenty-four (24) hours, and then makes a freight run in six (6) hours. What are they entitled to?

Answer. The crew having been held for a complete 8-hour period, compensation earned under the Held-Away-From-Home Terminal Rule and for the service trip should be paid separately. Crew is, therefore, entitled to 8 hours at the rate per hour paid them for the last service performed, and 8 hours for the service trip.

Question 3. After being held forty-three (43) hours at away-from-home terminal, a crew goes on duty and makes a freight run to their home terminal in six (6) hours. What is crew entitled to?

Answer. Crew is entitled to pay for 8 hours held-away-from-home terminal time, at the rate per hour paid them for the last service performed, for the first 24-hour period; 3 hours at the same rate for the second period beginning with the 41st hour; and 8 hours for the service trip.

Question 4. After being held twenty-three (23) hours at away-from-home terminal, a crew goes on duty and makes a freight run to their home terminal in nine (9) hours. What is crew entitled to?

Answer. Crew is entitled to pay for 7 hours at the rate per hour paid them for the last service performed, and 8 hours pro rata and 1 hour overtime for the service trip.

There are five (5) passenger crews assigned to cover a certain number of scheduled passenger trains, but these crews are in a pool and worked first-in first-out.

Question. Can these crews claim time at the away-from-home terminal under the Held-Away-From-Home Terminal Rule?

Answer. No; as crews are not in pool freight or in unassigned service.

ARTICLE XXVII

CALLING CREWS

Road crews and extra or unassigned yard crews will be called for service, it being incumbent upon

each employe involved to furnish the Management with a telephone number at which he can be contacted for calls for duty as all calls for service will be made by telephone. Details involving procedural arrangements for the calling of crews will be effectuated by the Management.

ARTICLE XXVIII

CALLED AND NOT USED

When road or yard service employes are called and perform no service other than to register, check bulletin book, get supplies, working clothes, etc., preparatory to going on duty, they will be paid a minimum of four (4) hours at pro rata rate in the class of service for which called and stand first out. If held more than four (4) hours they will be paid a minimum day in the class of service for which called and stand last out. In order to receive pay an employe must remain where he can be used until he is notified that his services will not be required. This Rule will not apply when an employe is called and he is later notified before leaving his place of residence that the call is cancelled. Payments under this rule will not affect the turn or standing of assigned employes.

ARTICLE XXIX

DEADHEADING

Train and engine service employes deadheading under orders of the Railway will be allowed pay for actual time consumed, at one-half the rate of the service to which being deadheaded, except that a maxi-

mum of eight (8) hours will be allowed for any one deadhead trip. Deadhead trips are to be paid as separate items and not combined with service pay unless the deadhead trip is an integral part of the service trip, in which event deadhead and service pay will be paid as one item. This Rule will not apply to employes deadheading for service as yardmen nor to any employes deadheading to exercise seniority rights.

ARTICLE XXX

EXTRA EMPLOYES

Extra lists for employes will be established at points designated by the Management.

Extra employes will be run first-in and first-out of terminals except that they will take the turn of the employes whose vacancies they are called to fill.

Extra employes will be governed by instructions promulgated by the Railway as to registering for service, marking up on the extra boards, return from leave of absence or furlough, etc.

The Railway will be divided into a designated number of "Selective Work Districts" for extra board employes, each extra board man to be permitted to elect the "Selective Work District" on which he desires to work, commensurate with his seniority standing and the requirements of the service, and will be called for the service on a first-in first-out basis, except as otherwise provided in these working conditions, for service originating in that "selective work District." Procedural details will be promulgated and published by the Management.

ARTICLE XXXI

MEAL PERIOD

A 30 minute meal period, without pay, will be allowed all yard and local freight crews. On through freight and passenger runs, where continuous service is required, employees will be expected to eat en route and there will be no meal period provided. Those crews granted meal periods will make pre-arrangements with the Dispatcher or Yardmaster in charge.

ARTICLE XXXII

UNIFORMS

Section 1

The Railway shall continue to designate a standard uniform and accessories to be worn by train service employes while on duty in passenger service, as required by the Railway. The standards shall be subject to change from time to time as required by the Railway, but shall, for the present, consist of the following:

(a) Uniform —
Cap, coat, vest and trousers.

(b) Accessories —
White shirt, black four-in-hand tie, black or dark blue socks (white when necessary for health) and black shoes.

(c) Insignia —
Badges, buttons, epaulets, etc.

Section 2

(a) When it is necessary, after the effective date of this Agreement, for train service employes to purchase new uniforms (with two pairs of trousers, if desired), or caps, the Railway will order same from a uniform contractor designated by the Railway, will pay the purchase price thereof and will make deductions from the employes through the payrolls, except as provided in paragraphs (e) and (i) of this section. The Superintendent or representative designated by him will be the sole judge as to when new uniforms shall be ordered.

(b) Train service employes assigned to passenger service, and extra train service employes with five (5) or more year's seniority as such will, after the effective date of this Agreement, be charged with only fifty (50) percent of the purchase price of their uniforms. Those with less than five (5) years' seniority as train service employes upon completion of one hundred (100) trips in passenger service, will be entitled to a refund of fifty (50) percent of the purchase price of their uniform if such refund is requested.

(c) To the end that uniforms will present a neat appearance, the employes shall keep them properly cleaned and neatly pressed at all times at their own expense.

(d) The employes will purchase and pay the entire cost of all uniform accessories and will keep them in proper condition to present a nice appearance.

(e) The Railway will supply, free of charge, all insignia required. The employes are responsible for the safe keeping of insignia and the transfer of same from old to new uniforms.

(f) Uniforms are to be worn only while on duty in passenger service on this Railway or in activities incident thereto, including layover hours at the away-from-home terminal, layover, or turning point.

(g) In cases where a uniform is lost, stolen, damaged or destroyed while not being used by the employe on duty for the Railway, the employe will repair each damage or replace such uniform at his own expense.

(h) If the Railway changes the standard of uniforms in use, and does not permit the employes to use the uniforms in their possession until they are due to be replaced by usage, the Railway will pay the entire expense of the new uniform required.

(i) When in the judgment of the Superintendent, a new uniform or cap is needed before it can be supplied by the designated uniform contractor, the Superintendent may authorize the employe to purchase same locally. In such case the employe will pay the full purchase price of the uniform, present the receipted bill for same to the Superintendent, and when the employe is entitled, under the provisions of paragraph (b) of this section, to a refund from the Railway, such refund will be made for fifty (50) per cent of the cost.

(j) Employes who are not equipped with a uniform will not be considered as available for passenger serv-

ice requiring uniforms. An extra board train service employe, not equipped with a uniform and cap and who stands to be called for uniformed passenger service under the first-in first-out rules of their respective agreements, will be skipped without penalty to the Railway and without changing his position on the extra board, and the first-out employee who is equipped with a uniform and cap will be used. Any employe who does not have a uniform and cap will be required to obtain one within thirty (30) days after being instructed to do so by the Superintendent, but exceptions to this requirement may be made by agreement between the Trainmaster and craft General Chairman when, in their judgment it is justified.

(k) In the event an employe not heretofore equipped with uniform and cap and who has sufficient seniority to take an assignment as train service employe in passenger service makes application to the Superintendent for the purchase of a uniform and cap, such purchase shall be approved. Such employe who makes application for purchase of uniform and cap for the purpose of taking an assignment in passenger service or to work in passenger service from the extra board shall not be considered as qualified for passenger service until he has received the uniform and cap and notified the Call Office.

(l) In the event application for purchase of uniform and cap is made by a man who has not heretofore equipped himself with such, but who would obviously stand for passenger service if so equipped, such purchase will be authorized, but no replacement of uniforms for men now possessing them will be authorized when it appears such men will not work from the

extra board and will not be needed for passenger service.

Section 3

It is understood that the provisions of this Agreement Rule shall be applicable to the following employes in the following circumstances:

(a) Employes regularly assigned as Train Service Employes in passenger service for full uniform, but not those assigned or used in mixed service, unless the Railway issues instructions requiring that men in such service wear uniforms.

(b) Employes regularly assigned as Train Baggagemen for cap and badge only; overalls or work clothes, of a type approved by the Railway and provided by employes at their expense, will be worn as required by the Superintendent.

(c) Extra board employes working in passenger service for full uniform.

Section 4

It is understood that, if in the judgment of the Superintendent, train service employes to be used in certain passenger service need not wear uniforms, he may waive the requirement.

Section 5

Nothing contained in this Agreement obligates the Railway to participate in the cost of purchasing new

uniforms and replacing uniforms for employes when it appears such employes will not be needed for passenger service.

ARTICLE XXXIII

DATE EFFECTIVE AND CHANGES

This Agreement shall be effective October 26, 1963, superseding all other rules, agreements and understandings in conflict herewith, as well as Check-Off Agreements.

This Agreement shall remain in effect until changed in accordance with the Railway Labor Act, as amended, except that there shall be no change in rates of pay or rules for a period of two years following the effective date of this Agreement.

Signed at St. Augustine, Florida, this day of 1963.

FOR THE CARRIER
FLORIDA EAST COAST
RAILWAY COMPANY
By:

_____

Assistant Vice President and
Director of Personnel

PLAINTIFF'S EXHIBIT No. 4A

Filed: May 26, 1964

FLORIDA EAST COAST RAILWAY COMPANY

NAME _____ JOB CLASSIFICATION: _____ RATE OF PAY: _____

HOME ADDRESS:

MARITAL STATUS:

_____

(Street) (Town) (State)

DATE OF ENTERING SERVICE: _____

SOCIAL SECURITY NUMBER: _____

DATE OF BIRTH: _____

I have this date been furnished with a copy of the Conditions of Employment in effect on the Florida East Coast Railway Company. These Conditions of Employment are completely satisfactory to me, my signature hereon signifying my acceptance thereof and willingness to work thereunder.

Signature_____

Date_____

PLAINTIFF'S EXHIBIT No. 4B

Filed: May 26, 1964

FLORIDA EAST COAST RAILWAY COMPANY

NAME: _____ JOB CLASSIFICATION: _____ RATE OF PAY: _____

HOME ADDRESS:

_____ MARITAL STATUS: _____

(Street) (Town) (State)

DATE OF ENTERING SERVICE: _____

SOCIAL SECURITY NUMBER: _____

DATE OF BIRTH: _____

I have this date been furnished with a copy of the Uniform Working Agreement in effect on the Florida East Coast Railway Company. The conditions of this Agreement are completely satisfactory to me, my signature hereon signifying my acceptance thereof and willingness to work thereunder.

Signature _____

Date _____

PLAINTIFF'S EXHIBIT No. 5

Filed: May 26, 1964

Florida East Coast Railway Company
St. Augustine, Florida,
February 24, 1954.
2

Mr. T. C. Bolin, General Chairman,
Order of Railway Conductors and Brakemen,
4728 Sappho Avenue,
Jacksonville 5, Florida.

Mr. D. G. Lemmon, General Chairman,
Brotherhood of Locomotive Engineers,
836 East Henry Street,
Savannah, Georgia.

Mr. W. T. Kitt, General Chairman,
Brotherhood of Locomotive Firemen and Enginemen,
1114 Magnolia Street,
New Smyrna Beach, Florida.

Gentlemen:

By letter dated November 4, 1963, you were advised that as of that date, November 4, the proposed Agreement appended to our Notice of September 25, 1963, was being placed into effect. Prior thereto, at 12:01 A. M., Tuesday, July 2, 1963, the Florida East Coast had placed into effect the work rules contained in the Section 6 Notice dated November 2, 1959. On August 29, 1963, at the direction of Secretary of Labor Wirtz and pursuant to legislation enacted by Congress and signed

by the President on August 28, 1963 (P. L. 88-108) the work rules contained in the November 2, 1959, Section 6 Notice were withdrawn.

On or about December 2, 1963, Civil Action 63-260-Civ-J was filed in the United States District Court for the Middle District of Florida seeking to enjoin Florida East Coast from continuing in effect or taking any action under the Notice of September 25, 1963, which makes changes in rates of pay, rules and working conditions encompassed by the Carrier's Notices of November 2, 1959, and the Unions' Notices of September 7, 1960, until the expiration of P.L. 88-108. On December 12, 1963, the Honorable Bryan Simpson, orally ruled that, ". . . the injunction should issue, limited to the notice changes encompassed in the November 1959 notices." In short, Judge Simpson ruled that certain provisions of the Uniform Working Agreement, as contained in the Notice of September 25, 1963, be held in abeyance until the expiration of P.L. 88-108. P.L. 88-108 will expire by its terms at midnight tonight, February 24, 1964.

Florida East Coast therefore gives notice that:

(a) Upon the expiration of P.L. 88-108, the Carrier will at 12:01 A.M., February 25, 1964, withdraw its Notice of August 29, 1963, withdrawing the work rules placed in effect at 12:01 A.M., July 2, 1963. The purpose of reinstating these rules as of 12:01 A.M., February 25, 1964, even though they have been superseded and replaced by the rules placed into effect on November 4, 1963, is to reaffirm the conditions that existed prior to August 29, 1963. In other words, even though superseding rules

are now in effect, the Carrier is aware that you disputed the right of the Carrier to place the superseding rules into effect on November 4, 1963, and that the Mediation Board has docketed your application for mediation in this matter as Case A-7056. As previously stated, it is our considered judgment that you were not in a position under the Railway Labor Act to make a valid request for the mediatory services of the National Mediation Board. However, if it should ultimately be determined that, despite your refusal to bargain, as required by the provisions of the Railway Labor Act, the Rules contained in our Notice of September 25, 1963, were not properly placed into effect on November 4, 1963, then the rules originally contained in the Carrier's Section 6 Notice of November 2, 1959, except those portions involving "Use of Firemen (Helpers) In Other Than Steam Power" (this Notice not having been served by this Carrier and this matter having been disposed of through negotiation with the International Association of Railway Employees, the duly authorized representative of locomotive firemen on this property) and "Consist of Crews" (there being no restriction on the Carrier with respect to this matter), shall be in full force and effect.

(b) The work rules placed into effect on November 4, 1963, and not held in abeyance pursuant to C.A. 63-260-Civ.-J remain in full force and effect.

(c) The work rules held in abeyance pursuant to C.A. 63-260-Civ.-J, are reinstated and made fully effective as of 12:01 A.M., February 25, 1964.

Yours very truly,

(Signed) R. W. WYCKOFF
Assistant Vice President and
Director of Personnel.

RWW-1
cc: Mr. Willard Wirtz, Secretary of Labor,
Washington 25, D. C.

Mr. E. C. Thompson, Executive Secretary,
National Mediation Board, Washington 25, D. C.

Received: March 2, 1964

PLAINTIFF'S EXHIBIT No. 6

Filed: May 26, 1964

Florida East Coast Railway Company
St. Augustine, Florida,
February 24, 1964.
2

CERTIFIED MAIL —
RETURN RECEIPT REQUESTED

Mr. H. O. Van Arsdall, Sr., General Chairman,
Brotherhood of Railroad Trainmen,
3030 N. W. 2nd Avenue,
Miami, Florida — 33127.

Dear Sir:

On July 8, 1963, the Railway gave you notice of the placing in effect as of 12:01 A.M., Wednesday, July 10, 1963, a Promulgation of Work Rules, copy of which is attached for your ready reference, served on the Chief Executives of your Organization on August 6, 1962, but not including Item I, Use of Firemen (Helpers) On Other Than Steam Power, this matter having been disposed of through negotiations with the International Association of Railway Employes, the duly authorized representative of locomotive firemen on this property. Insofar as concerns Item III, Consist of Crews, you were advised that that Item would be applicable only to the extent that the Management is now restricted in determining the size or consist of crews, such as crews in road switcher service and local freight crews loading and unloading less than carload freight, the Railway enjoying the unrestricted pre-

rogative to determine the size or consist of crews in all other types of service.

On August 29, 1963, at the direction of Secretary of Labor Wirtz and pursuant to legislation enacted by the Congress and signed by the President on August 28, 1963 (P.L. 88-108) the previously described work rules which had been placed in effect at 12:01 A.M., July 10, 1963, were withdrawn during the effective period of P.L. 88-108. In view of the fact that P.L. 88-108 will expire at midnight February 24, 1964, this will advise you that the Florida East Coast Railway Company upon the expiration of P.L. 88-108 will withdraw its previous notice withdrawing these work rules and said work rules are reinstated as of 12:01 A.M., Tuesday, February 25, 1964, but not including those portions involving "Use of Firemen (Helpers) On Other Than Steam Power" and "Consist of Crews". The reinstatement of these rules, originally contained in the Section 6 Notice dated November 2, 1959, in no way changes or modifies the Section 6 Notice of September 25, 1963, with respect to which negotiations are still proceeding with your Organization.

Yours very truly,

(Signed) R. W. WYCKOFF
Assistant Vice President and
Director of Personnel.

RWW-1

cc: Mr. Willard Wirtz, Secretary of Labor,
Washington 25, D. C.
Mr. E. C. Thompson, Executive Secretary,
National Mediation Board, Washington 25, D. C.

Received March 2, 1964

PLAINTIFF'S EXHIBIT No. 7

Filed: May 26, 1964

Florida East Coast Railway Company
St. Augustine, Florida
March 9, 1964
2

Mr. D. G. Lemmon, General Chairman
Brotherhood of Locomotive Engineers
P. O. Box 1184
Savannah, Georgia

Mr. T. C. Bolin, General Chairman
Order of Railway Conductors and Brakemen
4728 Sappho Avenue
Jacksonville 5, Florida

Mr. W. T. Kitt, General Chairman
Brotherhood of Locomotive Firemen and Enginemen
1114 Magnolia Avenue
New Smyrna Beach, Florida

Gentlemen:

On September 25, 1963 I gave notice, pursuant to the provisions of the Railway Labor Act, of desire of the Railway to make effective October 26, 1963 the agreement appended to that notice, superseding all other rules, agreements and understandings in conflict therewith at such time as it became effective. This matter was subsequently docketed by the National Mediation Board as Case A-7056.

Effective 12:00 P.M. today, March 9, 1964, the notice of September 25, 1963 is withdrawn. Although, as stated in our letter of February 24, 1964, the rules contained in the November 2, 1959 Section 6 notice are,

in our opinion, already in effect, in order that there may be no question, effective 12:01 A.M., March 10, 1964 the rules contained in carrier's Section 6 notice of November 2, 1959, except those portions involving "Use of Firemen (Helpers) On Other Than Steam Power" (this notice not having been served by this carrier and this matter having been disposed of through negotiation with the International Association of Railway Employes, the duly authorized representative of Locomotive Firemen on this property) and "Consist of Crews" (there being no restriction on the carrier with respect to this matter) will be placed in effect.

Effective 12:01 A.M., March 10, 1964 the agreements in effect will be those negotiated effective March 1, 1957 with the Brotherhood of Locomotive Engineers, February 1, 1956 with the Order of Railway Conductors and Brakemen, and December 1, 1946 with the Brotherhood of Locomotive Firemen and Enginemen, as each of those agreements has been amended, including amendment by the rules contained in the carrier's Section 6 notice of November 2, 1959, except as indicated above, and which rules are placed in effect at 12:01 A.M., March 10, 1964.

Yours very truly,

(Signed) R. W. WYCKOFF
Assistant Vice President and
Director of Personnel

RWW/p
cc: Mr. Willard Wirtz, Secretary of Labor
cc: Mr. E. C. Thompson, Executive Secretary,
National Mediation Board

Received: March 12, 1964

PLAINTIFF'S EXHIBIT No. 8

Filed: May 28, 1964

[1] CONFERENCE BETWEEN FLORIDA EAST COAST RAILWAY COMPANY and FEDERATION SYSTEM 69, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS: SHEETMETAL WORKERS NATIONAL ASSOCIATION, held at the offices of Florida East Coast Railway Company at King and Malaga Streets, St. Augustine, Florida, on Tuesday June 25, 1963, at 1:00 p.m.

PRESENT:

MR. R. W. WYCOFF,
Assistant Vice President and Director of Personnel, Florida East Coast Railway Company.

MR. W. J. GAINES,
Assistant Personnel Director, Florida East Coast Railway Company.

MR. R. A. ALEXANDER,
Assistant Personnel Director, Florida East Coast Railway Company.

MR. R. M. COOKE,
President, Federation System 69.

MR. C. A. DuPONT,
General Chairman, International Brotherhood of Electrical Workers.

MR. T. V. STEADMAN,
General Chairman, International Brotherhood of Boilermakers, Iron Shipbuilders Blacksmiths, Forgers and Helpers.

MR. R. L. LANIER,
General Chairman, Sheet Metalworkers National Ass'n.

[2] MR. WYCOFF:

Gentlemen, Mr. Rosenfeld is a court reporter and will record our discussion in connection with your Section 6 notice of May 31, 1963. If you desire, you may make your own arrangement with Mr. Rosenfeld for a copy of the transcript.

MR. COOKE:

We would like to make arrangements to not even have him here, if we had any choice, Mr. Wycoff. I don't see the necessity if we are going to have all this negotiation here on our notice, I do not see the necessity of having a court reporter here at all.

MR. WYCOFF:

Mr. Cooke, I think you will agree, it is only good business to have a record of what transpires in the course of our conference discussion to refer back to in case any question arises in the future as to what was said or what was not said.

MR. COOKE:

That may be. But, nevertheless, I wish that you would note that we have objected to having a court reporter present. I do not believe it is necessary at all.

MR. WYCOFF:

The record will reflect your objection. However, it is hard for me to believe that a responsible union representative would object to a record being made of what he has to say during a [3] conference discussion.

MR. STEADMAN:

It is something that hasn't been done in the past. It seems to me it would be a reflection on both parties. Always, we had agreed and have been in harmony with one another and trusted one another as to what went on.

MR. WYCOFF:

It is not a question of distrusting one another. It is simply good business to have a record of all that transpires. For this very reason, accurate records are kept as to what is said during the course of official sessions of governmental bodies, including The Congress of the United States. Certainly, it doen't mean that we distrust our Congressman because we keep a record of what he says.

MR. COOKE:

That may be true, Mr. Wycoff. We have never been confronted with it before, so you can readily realize that we are reluctant to go along with it. For that reason, we just haven't been confronted with it at any time in the past.

MR. WYCOFF:

Contrary to your statement, Mr. Cooke, I think you will recall the conferences in Mr. Ball's office on March 15 and May 10 in connection with other wage demands of the organizations, the court reporter was present. If my understanding is [4] correct, your organization has procured transcripts of those discussions for your use.

MR. COOKE:

Yes. But that was not on an initial conference on a wage rule notice such as this is, Mr. Wycoff. That was an unusual situation, you will have to admit.

MR. WYCOFF:

I do not consider it unusual. It was a discussion in connection with the Section Six notice. I might say at this time that from here on forward, on every discussion involving Section Six notices, the court reporter will be present.

MR. COOKE:

That doesn't leave much room for argument then.

MR. WYCOFF:

I have your Section Six notices of May 31 of this year. In reality they are two separate notices.

MR. COOKE:

Yes, sir.

MR. WYCOFF:

The first deals with so-called fringe benefits. I would like to discuss that first.

As I understand Section of Article I of Appendix A

dealing with vacations, you propose granting a fourth week of vacation to employees who have been in service ten years or more.

In that regard, Paragraph D of Article I, section [5] 1, you make reference to the qualifications as being rendering some compensated service during the preceding calendar year.

In reducing the qualifying requirements for two week vacation, three week vacation, they also make reference to some compensated service in the preceding calendar year.

For my own information, I would like to know what "some compensated service" contemplates.

MR. COOKE:

Well, one day would be sufficient. I think that has been defined as — compensated service.

MR. WYCOFF:

In other words, if an employee were to work, say, January 2, 1964, under your proposal, and he took a leave of absence and engaged in some other employment for the balance of the year, in 1965 the railroad would owe him as much as four weeks vacation, depending on the length of service.

MR. COOKE:

Have any of you all got any comments to make? The leave of absence hadn't entered into my mind.

MR. WYCOFF:

It wouldn't necessarily have to be a leave of absence. He could be furloughed.

MR. COOKE:

Under a furlough, yes, if he served [6] one day, then he qualifies.

MR. WYCOFF:

If he went to work for the balance of the year for some other company, he would be entitled to a vacation the following year?

MR. COOKE:

If they were furloughed, I don't believe that any of us would be concerned with what he did while he was furloughed. The company wouldn't be interested in that, to the extent he was furloughed from their service. He wouldn't be under any further obligation to them.

MR. WYCOFF:

How would he be earning a vacation with the railroad when he was working the whole year with some other company?

MR. COOKE:

He would have earned the vacation on his previous service.

MR. WYCOFF:

One day's service?

MR. COOKE:

Well, one day service would qualify him for it, yes.

MR. WYCOFF:

I thought the real theory behind vacation was to permit an employee to become refreshed and perform an-

other year's service after having time for rest and relaxation.

Here is a case I just mentioned where a man could work one day, be off the balance of the year, and still [7] he would be entitled to a vacation.

MR. COOKE:

He would still have the required period behind him, though. He wouldn't just have one day in service with the company.

MR. WYCOFF:

He would have only actually one working day service in that year.

MR. COOKE:

You are talking about an unusual, a very unusual situation.

MR. WYCOFF:

Not necessarily unusual. You have had many cases where employees had been off in January, had not performed any further service for the balance of the year.

MR. COOKE:

That may be true.

MR. WYCOFF:

Of course, there are other aspects of the vacation provision which would also increase wage costs as far as the railroad is concerned, all the qualifying requirements being reduced would naturally increase wage costs.

You have a provision covering holidays falling with-

in a vacation period which would mean increased wage costs.

Since the railway is not financially able to grant any increases in wage costs, the proposal will have to be declined.

[8] At this point, I would like to go on record as saying that your present proposals will have to be disposed of at the same time as the proposals over which your organization went out on strike are disposed of. In other words, any disposition of one demand will have to dispose of all demands.

MR. COOKE:

Well, we had already learned that unfortunately by listening to the radio and television and reading the newspapers. It had been publicized quite a bit.

MR. WYCOFF:

I just wanted to go on record as far as our conference was concerned in that regard.

Article II of your Appendix A covers holiday allowances.

As I understand it, it primarily is contemplating increasing the number of paid holidays from seven to nine. In addition, make it easier to qualify for payment for holiday allowance. Is that right?

MR. COOKE:

Yes, sir.

MR. WYCOFF:

Section 3 of that Article provides that each hourly, daily and weekly rated employee qualify for holiday pay provided in Section 1, if compensation paid by the carrier is credited to him at any time during the 60

calendar days preceding the [9] holiday or holidays, unless the employee was assigned to work on the work day of his work week immediately preceding or following the holiday, and he fails to report for work on such day without good cause.

Of course, you reduced the qualifying requirements to any compensated service in the 60-day period preceding the holiday, and good cause you made practically all-inclusive.

For example, you refer to good cause as including sickness, injury, disability, vacation, leave of absence, and any other reasonable cause.

Reasonable cause in my mind, if your proposal were ever to be adopted would cause a considerable amount of dispute.

For example, if you have an assigned employee that lays off the day before a holiday to drive to the West Coast of Floridt to visit his daughter, as far as he is concerned, that might be a reasonable cause for failure to report for duty.

MR. COOKE:

No.

MR. WYCOFF:

As far as management is concerned, we do not agree with that.

MR. COOKE:

No, I wouldn't agree with it either because the balance of the section there covers that. [10] Laying off in anticipation of the holiday or to prolong it would not be a reasonable excuse.

MR. WYCOFF:

Let us say that his daughter is graduating. Say he laid off the day before the 4th of July holiday to attend some sort of graduation exercises, or his daughter is in the hospital going to have a baby, would you consider that a reasonable excuse.

MR. COOKE:

I would not personally, no.

MR. WYCOFF:

I am just curious. As I say, I think that is going to be a cause of conflict in the event your proposal ever were to be adopted.

On the fringe benefit portion of your proposal covering hospital, surgical and medical benefit and group life insurance, as I understand it, you contemplate keeping the same health and welfare benefits in effect, presently effective, for a three-year period beginning March 1, 1964. In the event the premiums should increase, it would be the carrier's obligation to pay the increased premium.

MR. COOKE:

That's right.

MR. WYCOFF:

In addition, you desire to increase group life insurance from $4000 to $6000 per employee, and give $2000 of life insurance to each retired [11] employee, all at the carrier's expense.

MR. COOKE:

That's correct.

MR. WYCOFF:

All of those proposals would increase the wage costs of the company.

I said a minute ago, the company is not financially able to grant any wage increases or increased wage costs at this time. Therefore, those proposals will have to be declined.

You have a second proposal which covers stabilization of employment and wage increase.

On the wage increase, you are requesting an increase in the amount of 10% plus 14 cents per hour effective June 30, 1963, with subsequent wage increases in the amount of 3 1/2% per year.

As an example, in the event a wage increase were to be negotiated under your proposal at some future date, let us say it became effective, for example, January 1, 1964, under your proposal when would the subsequent wage increase of 3 1/2% be made effective?

MR. COOKE:

At the mid-point of the 12-month period, which would be at the end —

MR. WYCOFF:

In other words, six months later?

MR. COOKE:

Yes.

MR. WYCOFF:

In other words, in effect what you [12] are asking for is your 10% increase, plus 14 cents an hour, plus 3 1/2% all within a period of six months.

MR. COOKE:

Well, perhaps the first one would be six months following the initial increase.

MR. WYCOFF:

That was my question. When the first subsequent wage increase would be effective. Of course, the cost of living adjustment provision, as I understand those, but there again, the company is not financially able to grant any wage increase, so for that reason I will have to decline your proposal.

On the stabilization portion of your notice —

MR. COOKE:

I think you are getting ours mixed up with someone else's.

MR. WYCOFF:

Don't you have a stabilization portion?

MR. COOKE:

No.

MR. DuPONT:

That was in our last Section Six.

MR. COOKE:

That was last year.

MR. WYCOFF:

I am sorry. Actually, we covered all aspects of it. Do you have any comments you desire to make in connection with your notice?

MR. DuPONT:

I have. I would like to know what is your proposal to combine Section Six notices that [13] we are now on strike with, and this Section Six notice. How do you propose to go about that? What is the mediation? This is an additional conference.

MR. WYCOFF:

I am not combining the Section Six notices. They are separate notices, as I said a minute ago, the disposition of one notice will require dispoition of the other notice insofar as the company is concerned. In other words, we will not dispose of one set of demands without disposing of the other set of demands.

MR. DuPONT:

How do you propose to do that?

MR. WYCOFF:

Through negotiation.

MR. DuPONT:

In other words, words, what you are trying to say you are willing to negotiate a complete settlement up to date?

MR. WYCOFF:

I am telling you that any consideration of one demand will entail consideration of the other demand at the same time.

MR. DuPONT:

One of us don't make sense.

MR. COOKE:

That in effect was what the newspapers stated following your meeting with the Mediator Switzer.

MR. WYCOFF:

That is right.

MR. COOKE:

That you insisted to him that the [14] present notice had to be thrown in the pot with the old one.

MR. WYCOFF:

I told him when we consider one set of demands, we are going to consider both sets of demands at the same time.

MR. COOKE:

I thought you related the proposal to him —

MR. WYCOFF:

I am not making any proposal at all. I said that was the position of the company. That was not a proposal.

MR. COOKE:

We felt that you were throwing this notice into mediation before you entered our initial conference on it

MR. WYCOFF:

No, absolutely not. We were talking with Mr. Switzer concerning your Section Six notice of September 1, 1961, a notice over which you subsequently went on strike. I told him that we did not consider any disposition of that dispute without also disposing of this dispute at the same time.

MR. DuPONT:

Well, as I understand it, you would be willing to open negotiations on a complete settlement up to date?

MR. WYCOFF:

It is not a case of opening negotiations. Negotiations have been open right along.

[15] MR. DuPONT:

Not on this question we just served.

MR. WYCOFF:

We are negotiating on this today.

MR. DuPONT:

That is what I say. Now, whay would you propose to do is negotiate on a complete settlement up to date?

MR. WYCOFF:

What I propose to do is any time we are talking about either of your disputes, we are talking about both of your disputes at the same time. In other words, it is only logical that the company could not agree to dispose of one set of demands and have the other set still hanging over their head.

MR. COOKE:

But still, Mr. Wycoff, when we attempted to reopen negotiations with you on the old dispute there in Jacksonville, I believe it was on March 10 if I am wrong, correct me on the date —

MR. WYCOFF:

We had two meetings with Mr. Ball, one on March 15 and May 10.

MR. COOKE:

We attempted then to reopen negotiations and the company had nothing to offer. Mr. Ball stated flatly he had absolutely nothing to offer, which to us didn't mean that he was willing to negotiate.

MR. WYCOFF:

I just got through telling you the company is not financially able to make any wage [16] increases, any increase in wage costs. If you have any proposals to offer whereby monetary rules can be revised, such as your vacation rule, your holiday pay rule or other monetary rule which could offset the cost of wage increase, we would be willing to listen to your proposals.

MR. DuPONT:

We don't have any proposals to deal for less money. We are getting less now than—

MR. COOKE:

Do you have anything to say?

MR. LANIER:

He said he is ready to negotiate. We have given him our proposals. Do you have any counter proposals we might negotiate on?

MR. WYCOFF:

It isn't a question of the Railway having counter proposals. I told you the Railway is not financially

able to grant any wage increase. If you have any proposals to make whereby a wage increase can be offset by changing some of your existing monetary rules, I will be glad to listen to them and see if we can negotiate something on that basis.

MR. COOKE:

What he means is, he is willing to negotiate but he isn't able to negotiate.

MR. LANIER:

I know exactly what he is trying to say. We can't negotiate unless he gives us something he wants, what do you want us to change?

[17] MR. WYCOFF:

I just threw out two examples.

MR. LANIER:

Would you give it to us in writing?

MR. WYCOFF:

I think we told you that. It is on record here. You have it as far as the record is concerned.

MR. STEADMAN:

In other words, what you want is to give us something and take a decrease which the employee wouldn't be a bit better off. They would be the same thing as they are today. That doesn't make sense to me.

MR. WYCOFF:

Basically, what you are saying is correct, the railroad is not financially able to grant any wage increase or any increase in wage costs. To grant such an increase would mean we have to offset it be revising some other rule.

MR. DuPONT:

Let us cut everybody's salary down to the same thing then. We will offset high cost of management, get some of the people that are doing the work —

MR. WYCOFF:

I don't understand your statement, Mr. DuPont.

MR. DuPONT:

Let us cut down some of these $16,000 a year executives and pay them $5,000 a year, like the men that are out there doing the work.

[18] MR. WYCOFF:

I don't think any executive is getting $16,000 a year. Do you?

MR. DuPONT:

I'd be foolish to say if I didn't know it to be a fact. If you want to know where I got my information —

MR. WYCOFF:

If you gentlemen have any proposals to make, I will be gald to listen to them and see what we could work out on tem.

MR. COOKE:

Mr. Wycoff, our proposals are down in writing. You have declined them. I don't see any further concession that we can make on it.

MR. WYCOFF:

The company is not financially able to grant your demands.

MR. COOKE:

Requests, Mr. Wycoff. I don't like to hear the word "demand". We haven't demanded anything.

MR. WYCOFF:

Your demands are such that you are going out on strike over a portion of them.

MR. COOKE:

Requests. It was still a request then. It wasn't a demand.

MR. WYCOFF:

All right, it is merely a choice of words.

MR. STEADMAN:

We feel and I know the employees feel that what on our last proposal of 10.28 would have [19] been a fair settlement and we can't see any difference — I can't. All other railroads paid it and FEC is a first-class railroad. At the time as well as I recall, we were negotiating that one time there. It wasn't about $38,000 as I recall difference in between our negotiations as to what we would come out with. At one time the proposal you offered.

MR. WYCOFF:

That is correct. However, the proposals were designed so the brunt of the wage increase cost would not hit us all at one period. If you will reflect, you will remember that it was divided into three separate six-month segments, so that actually the last segment came 18 months following the date of the first one, spreading the cost over an 18-month period, with a moratorium on future wage demands for a period of 18 months.

The organizations saw fit to reject it. That proposal was made in good faith by the company. It would have given the employees, we feel, more financially than they received on the National basis. However, the organizations apparently, simply because it was different than the National Settlement, rejected it.

[20] Since that time, the organizations went out on strike and we were forced to withdraw our proposal because we have no financial ability now to grant any wage increase or increase in wage cost.

MR. DuPONT:

Your proposal was to pay more to some and less to the rest, and there was no assurance that anybody would be here to get the benefits at higher rates you offered us. You recall that we asked you to freeze jobs for a length of time so that people that would accept that proposition would be around to enjoy the benefits of it. The company couldn't see fit to promise us that we would be here to enjoy the benefits, so why should we accept them.

MR. WYCOFF:

Do you have an assurance under any wage increases that a given number of employees are going to continue to work?

MR. DuPONT:

I don't have any assurance that I will even be living tomorrow, much less working, but I like to look forward to anything.

MR. WYCOFF:

Certainly, the railroad cannot freeze a given number of employees to the jobs without knowing what the future holds.

MR. DuPONT:

You know what the future holds about the increase in wages.

[21] MR. WYCOFF:

Anticipating there is going to be an increase in revenues —

MR. DuPONT:

Use the same anticipation to give the people a promise for a job for that time —

MR. WYCOFF:

It would be tantamount to bankrupting the company.

MR. COOKE:

My Wycoff, I would like to ask you just one more question. It is foolish, I know, in view of my past experience with you: If a National Carriers' Conference Committee is organized to handle a similar notice with the Employees National Conference Committee would you be willing to authorize the representative of the FEC Railway to handle the matter nationally?

MR. WYCOFF:

No, we will not. In fact, I want to go on record now as saying that this and all future notices in negotiating will be locally on the property, will be negotiated locally on the property.

MR. COOKE:

Do any of you gentlemen have anything further to ask him? I suppose we might as well close it off, Mr. Wycoff, unless you have something else you want to offer on it.

MR. WYCOFF:

No, I have nothing.

MR. COOKE:

Suppose we just recess our negotiations [22] for the time being?

MR. WYCOFF:

It is not a question of recessing our negotiations. I will write you giving you my decision on the request.

MR. STEADMAN:

Let it be a matter of record we asked to recess the conference.

MR. WYCOFF:

I am not agreeable to recessing the conference.

MR. LANIER:

You will confirm this in writing?

MR. WYCOFF:
Yes, sir. You will also have a copy of the transcript if you make the arrangements with Mr. Rosenfeld.

(Whereupon, the conference adjourned at 1:45 p.m.)

DEFENDANT'S EXHIBIT B

Filed: May 27, 1964

INTERNATIONAL BROTHERHOOD
ELECTRICAL WORKERS

Local No. 888

Office of Director
of Personnel
Fla. East Coast Railway Co.

Feb. 8, 1963
18 Poinciana Ave.
St. Augustine, Fla.

Mr. L. Lueders
Gen. Supt., Locomotive Dept.
F. E. C. Ry.
Bowden, Florida

Dear Sir:

In reference to your Bulletin #BL-4, dated Feb. 3, 1963, in which you have advertised for one Electrician for duty at Bowden, Florida.

Please be advised that the employes that I represent have withdrawn from service of the F. E. C. on a legal strike and such employes are not subject to call for service.

Respectfully yours,

(Signed) C. A. DuPONT
C. A. DuPont
Pres. & Gen. Chairman
Local #888, IBEW

cc: R. W. Wyckoff
H. L. Herndon

Received
Feb. 11, 1963

DEFENDANT'S EXHIBIT C

Filed: May 27, 1964

INTERNATIONAL BROTHERHOOD
ELECTRICAL WORKERS

Local No. 888

Miami, Florida

Subscribed to before me this
17th day of April 1963

(SEAL)

(Signed) C. T. LUCAS, JR.
C. T. Lucas, Jr.
Notary Public, State of Fla.
at Large

My Commission Expires
April 2, 1966

L. J. Johnson III
Local Union No. 888, IBEW
1468 NW 102 St.
Miami, Fla.

Dear Sir and Brother:

I, C. H. Cody, Card No. C-57719, a member of Local Union No. 888, IBEW, hereby prefer charges against Brother J. O. Elliott, Card No. 721084, member of Local Union No. 888, IBEW, whose last known mail-

ing address is 650 NE 160th St., North Miami Beach, for violation of the following.

AGREEMENT . . . . . Article—— Section ———,

Subsection ——— BY-LAWS . . . . . .Article ——

SECTION ———— SUBSECTION —— CONSTITUTION .. Aticle ARIXXVII Section 2, Subsection 9 & 20. The violation occurred on April 3rd 1963 at approximately 6:45 (AM) (PM) at F.E.C. Bowden Shops The violation occurred as follows:

J. O. Elliott was working for the F.E.C. Ry. as electrical forman at the time that a strike was called by the 11 non-operating brotherhoods, effective Jan 23rd 1963. The foremans jobs were abolished as of Jan. 23rd 1963. J. O. Elliott accepted a position as Gen. forman with the F.E.C. Ry on or about March 26th 1963 and reported for duty on March 27th 1963. He is passing thru our picket lines and has been seen performing the duties of most all R. R. crafts.

Fraternally yours,

(Signed) C. H. CODY

Minutes of Executive Board Meeting
Local #888 IBofEW Miami, Fla.
220 Oriole Avenue
Miami Springs, Fla.

Executive Board
Members Present

C. A. DuPont, Chairman, C. R. Underhill, Jack Figaro and L. J. Johnson. - Carl K. Smith, Int. Rep. IBof EW was also in attendence as adviser.

Meeting called to order at above address at 8:00 P. M. 5-27-63 Charges read as filed against J. O. Elliott who has crossed picket line at Bowden Yards to return to work for the strike bound F. E. C. Rwy. These charges filed April 17, 1963, Article # 27 Sec. #2, Paragraphs 9 and 20 of IBofEW Constitution and Local By-Laws being violated. Brother Elliott was notified of the above charges and date set for hearing. He did not report for hearing and only notified the Recording Secretary through a friend that he could not attend.

Discussions were had on charges as filed against Brother Elliott; the decision of the trial board was guilty as charged, penalty to be imposed for above Brother Elliott will be notified of the trial board action and penalty.

Motion to adjourn meeting by Brother Underhill, seconded by Brother Figaro. Meeting adjourned at 9:45 P. M.

(Signed) L. J. JOHNSON
L. J. Johnson
Recording Secretary

May 28 1963
1468 N. W. 102 St.
Miami, Florida

Mr. J. O. Elliott
650 N. E. 160 Street
North Miami Beach, Fla.

Dear Sir:

Please be advised the Executive Board, sitting as a Trial Board of Local Union 888, I. B. E. W., on May 27th, 1963, after due consideration of the evidence produced has acted upon the charges filed against you by Brother C. H. Cody. The charges alleged you violated; Article XXVII, Section 2, Sub Sections 9 and 20.

The decision of the Trial Board is as follows:

Guilty as Charged.

Due to the seriousness of the charges that have been brought against you and the finding of guilt in the case, it is the decision of this Trial Board that you be expelled from Local 888, I. B. E. W.

Fraternally Yours

(Signed) L. J. JOHNSON

cc: Mr. Joseph D. Keenan, I. S.
Mr. Thomas Ramsey, I. V. P.
Mr. J. T. Jaillette, F. S.
C. M.

COPY

650 N. E. 160th Street
North Miami Beach, Fla.
May 26, 1963

Mr. L. J. JOHNSON, Recording Secretary,
Local Union 888
International Brotherhood of Electrical Workers,
1468 N. W. 102nd. Street,
Miami 447, Florida.

Dear Sir:

I have your notice of May 23, 1963, directing that I appear before the Trial Board of Local Union No. 888, I. B. E. W., Miami, Florida, May 27, 1963, to answer charges filed against me by Brother C. H. Cody, Card No. C-57719 for an alleged violation of Article XXVII, Section 2, Subsections 9 and 20 of the International Constitution.

Under an agreement negotiated by various labor organizations with the Florida East Coast Railway Company, including the International Brotherhood of Electrical Workers, employees are not required to remain members of an Organization when occupying positions which are excepted from the bulletining and displacement rules of the individual agreements. Such employees are free, however to be members of the Organization at their option.

On March 27, 1963, I was offered and accepted, a supervisory position as General Foreman with the Florida East Coast Railway Co. . Although it was not

necessary that I retain membership in the I. B. E. W., I continued paying my dues, assuming that the Organization would recognize the fact that retention of Union membership was not an obligation on my part. In view of the circumstances, it is obvious that I am not guilty of violation of any portion of the Constitution of the I. B. E. W. as alleged in your notice.

With respect to the hearing on May 27, I regret that commitments and, therefore, will be unable to appear as requested. However, this is to go on record that I do not consider that I am in violation of any portion of the I. B. E. W.'s constitution.

Yours truly,

(Signed) J. O. ELLIOT

DEFENDANT'S EXHIBIT D

Filed: May 27, 1964

SYSTEM FEDERATION NO. 69

January 16, 1963

STRIKE CALL AND INSTRUCTIONS PERTAINING TO CONDUCT OF STRIKE

TO ALL LOCAL CHAIRMEN, MEMBERS AND EMPLOYES ON THE FLORIDA EAST COAST RAILWAY REPRESENTED BY THE FOLLOWING ORGANIZATIONS:

System Federation No. 69

International Association of Machinists
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
Sheet Metal Workers' International Association
International Brotherhood of Electrical Workers
Brotherhood Railway Carmen of America
Helpers, Round House and Railway Shop Laborers

Dear Sirs and Brothers:

THE ISSUES

On September 1, 1961, the Eleven Cooperating Railway Labor Organizations representing the non-operating railroad employes of the country, served on all the railroads of the United States on which they rep-

resent employes a notice under the Railway Labor Act proposing a general wage increase of twenty-five cents an hour effective November 1, 1961, and a rule requiring not less than six months' notice of reductions in force or abolition of jobs.

The railroad managements met these proposals with counter-proposals that most rates of pay be cut by twenty percent; that in other classifications the starting rate be cut by twenty percent and the present rate be attained only gradually over a five-year period; that the wages of dining car waiters and other employes serving food or drinks be cut to $1.25 per hour; and that rates not subject to these reductions be not increased. They further proposed reducing all notice requirements for force reductions and job abolitions to no more than twenty-four hours.

The Florida East Coast Railway was one of the Railroads on which our proposal was served and which served the counter-proposals.

Between November 27 and December 27, 1961, the issues arising from these proposals and counter-proposals were submitted by the organizations to the employes they represent on the several railroads in a strike ballot. The employes, including those represented by each participating organization on the Florida East Coast, voted overwhelmingly to strike if necessary to secure an acceptable agreement disposing of these issues.

The major railroads, generally, joined in setting up Carriers' Conference Committees to handle the dispute to a conclusion with our Employes' National Con-

ference Committee under the procedures of the RAILWAY Labor Act on a joint national basis as has been customary in such movements for thirty years. The Florida East Coast refused to participate in such national handling, as it had done in prior joint national movements.

The dispute was progressed in joint national handling through the procedures of conferences and mediation under the Railway Labor Act, and on March 6, 1962, became the subject of investigation by an Emergency Board appointed by the President of the United States under Section 10 of the Railway Labor Act. That Board made its report and recommendations to the President on May 3, 1962. Its recommendations were bitterly disappointing, and, in our judgment, utterly failed to do justice to the claims of the employes.

Nevertheless, in deference to the public interest in avoiding an interruption in railroad transportation, the participating organizations, on June 5, 1962, made an agreement with the railroads represented by the Carriers' Conference Committees disposing of the dispute on substantially the terms recommended by the Emergency Board. The agreement provided for a wage increase of 4 cents per hour effective as of February 1, 1962, an additional wage increase of 6.28 cents per hour as of May 1, 1962, and at least five working days' advance notice of abolishment of positions or reductions in force.

Other railroads not represented by the Carriers' Conference Committees have, with few exceptions, disposed of the dispute on terms identical to those contained in the national agreement. The Florida East

Coast is the outstanding exception. This railroad insists on discriminating against its employes notwithstanding the diligent efforts of your organization representatives ever since last June to reach a settlement on the basis that virtually every other railroad has found acceptable.

In light of these events, we cannot in good conscience dispose of this dispute on any basis that would accord treatment to Florida East Coast employes inferior to that accorded employes of all other major railroads. Necessarily the dispute to be disposed of remains that arising from our proposal of September 1, 1961, and the carrier's counter-proposals. We have outlined our efforts to settle the dispute and the bases of settlement the carrier has refused to accept, but there should be no mistake about the fact that the dispute on which this strike is called involves exactly the issues on which the strike ballot was circulated on November 27, 1961.

We have consequently been required to conclude that we can no longer defer the exercise of the responsibility to call a strike pursuant to the almost unanimous vote of the employes in the strike ballot. This is the only way the dispute can be settled in fairness to the employes we represent.

TIME AND DATE OF STRIKE

ACTING PURSUANT TO THE CONSTITUTIONS AND LAWS OF OUR RESPECTIVE ORGANIZATIONS, OPERATING THROUGH THE RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO, AND WITH THE APPROVAL OF THE EXECUTIVE COUNCIL

AND THE PRESIDENT OF THE RAILWAY EMPLOYES DEPARTMENT, AFL-CIO, A STRIKE OF THE FLORIDA EAST COAST RAILWAY IS HEREBY CALLED TO COMMENCE ON WEDNESDAY, JANUARY 23, 1963, AT 6:00 A.M., EASTERN STANDARD TIME.

Duties of Employes and Officers in Conduct of Strike

In connection with the strike the following instructions are to be observed:

1. No employes of the Florida East Coast Railway represented by our organizations will perform any service after the hour set to strike.

Those employed at points where joint service is performed for other roads will on the receipt of this letter notify the proper officers of the carrier whose facilities are joint with the Florida East Coast that on and after 6:00 A. M. Eastern Standard Time, January 23, 1963, they will not be on duty, giving the reasons why.

Employes of other railroads, terminals or joint facilities who also perform service for the Florida East Coast and who are not ordered on strike, will discontinue performing any service for the Florida East Coast.

2. All employes on strike will keep away from the company property except such men as are designated certain duties to be performed in furtherance of this strike by authority of the organizations.

3. At various points on the carrier system the organizations will arrange for halls for meeting purposes. Consult your Local Chairman or other authorized representative for information as to the location of the point at which you are to meet. Immediately after the strike becomes effective all men except those assigned to immediate picket duty will assemble at the designated meeting halls. All strikers will be expected to register and be available for assignment to picket duty.

Only persons on strike and duly accredited representatives of the organizations will be permitted to be present in the meeting halls, unless otherwise authorized by the Chairman of the meeting.

4. Detailed daily instructions concerning the conduct of the strike will be given at the meeting halls. All strikers will be required to attend such meetings unless on picket duty or excused by the Chairman of the meeting.

5. Every employe must understand that the laws of the organizations involved must be obeyed. Acts of violence of any nature will not be tolerated by the organizations.

6. In the conduct of every strike there are numerous irresponsible persons, not members of the organizations, who take occasion to engage in acts of violence and disorderly conduct. Such acts are usually attributed to members of the organizations and great care shoud be taken by all employes to avoid associating with such persons.

7. Some carrier officials or their emissaries may endeavor to coerce or mislead the men by asserting that men at other points have not gone on strike or that they have returned to work. Such statements should be ignored and all strikers should apply to their officers and committeemen for information and be governed accordingly. **No employe will return to work until the strike is officially terminated.**

8. Employes on picket duty are expressly instructed to grant permission to train and engine service employes to cross picket lines to the extent necessary to bring passenger trains that are en route at the time strike is called to their destination and to bring freight trains that have already left a terminal to their next terminal. We wish to avoid the harm that would be caused to the public by leaving passengers or freight stranded enroute at the time the strike is called. **Employes of classes or crafts other than the crafts on strike are requested to refrain from crossing picket lines except to the extent herein indicated.**

9. The Local Chairmen will be instructed as to their duties by the General Chairmen and Grand Lodge Officers.

You should notify the citizens in your locality of the pending strike in order that they may not be unduly inconvenienced thereby and have time to make the necessary arrangements to protect themselves.

The Railroad Retirement Board has been advised of this action and will designate representatives for the purpose of your filing for unemployment compen-

sation. Their names and locations will be furnished to you at a late date.

You will keep this circular private; read it carefully and carry out its provisions to the letter so far as it applies to you; see other directly interested and in the event they fail to receive a copy, instruct them in accordance with the terms set forth herein. Failure to receive this circular is no excuse for remaining in the service after the strike has been declared. Every employe, member and non-member, is expected to obey the strike order which has been issued and any person remaining in the service after the strike is on will be designated as a strikebreaker.

Clearly defined cases of disloyalty or difference either as to discipline or safety measures, taken at once be reported to his organization and necessary action, either as to discipline or safety measures, taken at once.

It is understood that similar instructions are being issued by the duly authorized representatives of the other cooperating organizations. the cooperating organizations involved in this dispute are:

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
Brotherhood Railway Carmen of America
International Brotherhood of Electrical Workers
International Association of Machinists
Sheet Metal Workers' International Association
International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Brotherhood of Maintenance of Way Employes
The Order of Railroad Telegraphers
Brotherhood of Railroad Signalmen
Hotel and Restaurant Employees and Bartenders International Union

Your officers are convinced that a firm stand at this time will result in a victory for you in this important situation and have full confid3nce in your courage and integrity.

THIS STRIKE IS AUTHORIZED AND CALLED IN ACCORDANCE WITH THE CONSTITUTIONS AND BY LAWS OF OUR ORGANIZATIONS AFTER COMPLYING WITH ALL OF THE APPLICABLE PROVISIONS AND REQUIREMENTS OF THE RAILWAY LABOR ACT.

Fraternally yours,

(Signed) R. M. COOKE, (Carmen)
R. M. Cooke, President
System Federation No. 69

(Signed) R. W. McDOUGALL
System Federation No. 69

(Signed) R. W. McDOUGALL
R. W. Mc Dougall,
General Chairman
International Association of
Machinists

(Signed) T. B. STEADMAN
T. B. Steadman,
General Chairman
International Brotherhood of
Boilermakers, Iron Ship
Builders, Blacksmiths,
Forgers and Helpers

APPROVED:

/s/ MICHAEL FOX

Michael Fox, President
Railway Employes' Department, AFL-CIO

/s/ JOSEPH W. RAMSEY
J. W. Ramsey, General Vice President
International Association of Machinists

/s/ RUSSELL K. BERG
Russel K. Berg, International President
International Brotherhood of Boilermakers,
Iron Ship Builders, Blacksmiths, Forgers
and Helpers

/s/ J. W. O'BRIEN
J. W. O'Brien, General Vice President
Sheet Metal Workers' International Assn.

(Signed) R. L. LANIER
R. L. Lanier,
General Chairman
Sheet Metal Workers'

(Signed) C. A. DuPONT
C. A. Du Pont,
International Brotherhood of
General Chairman
Electrical Workers

(Signed) R. M. COOKE
R. M. Cooke,
General Chairman
Brotherhood Railway Carmen
Of America

(Signed) J. L. CHRISTIAN
General Chairman
Firemen, Oilers, Helpers,
Round House and Railway
Shop Laborers

/s/ THOS RAMSEY
Thos. Ramsey, International Vice President
International Brotherhood of Electrical
Workers

/s/ A. J. BERNHARDT
A. J. Bernhardt, General President
Brotherhood Railway Carmen of America

/s/ ANTHONY MARTZ
Anthony Matz, President
International Brotherhood of Firemen,
Oilers, Helpers, Round House and
Railway Shop Laborers

DEFENDANT'S EXHIBIT G

Filed: May 27, 1964

BROTHERHOOD OF RAILWAY CLERSK
FLORIDA EAST COAST RAILWAY
SYSTEM BOARD OF ADJUSTMENT

January 16, 1963

STRIKE CALL AND INSTRUCTIONS PERTAINING TO CONDUCT OF STRIKE

TO ALL LOCAL CHAIRMEN, MEMBERS AND EMPLOYES REPRESENTED BY THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES ON THE FLORIDA FAST COAST RAILWAY

Dear Sirs and Brothers:

THE ISSUES

On September 1, 1961, the Eleven Cooperating Railway Labor Organizations representing the non-operating railroad employes of the country, served on all the railroads of the United States on which they represent employes a notice under the Railway Labor Act proposing a general wage increase of twenty-five cents an hour effective November 1, 1961, and a rule requiring not less than six months' notice or reductions in force or abolition of jobs.

The railroad managements met these proposals with counter-proposals that most rates of pay be cut by twenty percent; that in other classifications the starting rate be cut by twenty percent and the present rate be attained only gradually over a five-year period; that the wages of dining car waiters and other employes serving food or drinks be cut to $1.25 per hour, and that rates not subject to these reductions be not increased. They further proposed reducing all notice requirements for force reductions and job abolitions to no more than twenty-four hours.

The Florida East Coast Railway was one of the railroads on which our proposal was served and which served the counter-proposals.

Between November 27 and December 27, 1961, the issues arising from these proposals and counter-proposals were submitted by the organizations to the employes they represent on the several railroads in a strike ballot. The employes, including those represented by each participating organization on the Florida East Coast, voted overwhelmingly to strike if necessary to secure an acceptable agreement disposing of these issues.

The major railroads, generally, joined in setting up Carriers Conference Committees to handle the dispute to conclusion with our Employes' National Conference Committee under the procedures of the Railway Labor Act on a joint national basis as had been ccustomary in such movements for thirty years. The Florida East Coast refused to participate in such national handling, as it had done in prior joint national movements.

The dispute was progressed in joint national handling through the procedures of conferences and mediation under the Railway Labor Act, and on March 6, 1962, because the subject of investigation by an Emergency Board appointed by the President of the United States under Section 10 of the Railway Labor Act. That Board made its report and recommendations to the President on May 3, 1962. Its recommendations were bitterly disappointing, and, in our judgment, utterly failed to do justice to the claims of the employes.

Nevertheless, in deference to the public interest in avoiding an interruption in railroad transportation, the participating organizations, on June 5, 1962, made an agreement with the railroads represented by the Carriers' Conference Committees disposing of the dispute on substantially the terms recommended by the Emergency Board. The agreement provided for a wage increase of 4 cents per hour effective as of February 1, 1962, an additional wage increase of 6.28 cents per hour as of May 1, 1962, and at least five working days' advance notice of abolishment of positions or reduction in force.

Other railroads not represented by the Carriers' Conference Committees have, with few exceptions, disposed of the dispute on terms identical to those contained in the national agreement. The Florida East Coast is the outstanding exception. This railroad insists on discriminating against its employes notwithstanding the diligent efforts of your organization representatives ever since last June to reach a settlement on the basis that virtually every other railroad has found acceptable.

In light of these events, we cannot in good conscience dispose of this dispute on any basis that would accord treatment to Florida East Coast employes inferior to that accorded employes of all other major railroads. Necessary, the dispute to be disposed of remains that arising from our proposal of September 1, 1961, and the carrier's counter-proposals. We have outlined our efforts to settle the dispute and the bases of settlement the carrier has refused to accept, but there should be no mistake about the fact that the dispute on which this strike is called involves exactly the issues on which the strike ballot was circulated on November 27, 1961.

We have consequently been required to conclude that we can no longer defer the exercise of the responsibility to call a strike pursuant to the almost unanimous vote of the employes in the strike ballot. This is the only way the dispute can be settled in fairness to the employes we represent.

TIME AND DATE OF STRIKE

ACTING PURSUANT TO THE CONSTITUTION AND LAWS OF OUR ORGANIZATION, A STRIKE OF THE EMPLOYES WE REPRESENT ON THE FLORIDA EAST COAST RAILWAY IS HEREBY CALLED TO COMMENCE ON WEDNESDAY, JANUARY 23, 1963, AT 6 A.M., EASTERN STANDARD TIME.

Duties of Employes and Officers in Conduct of Strike

In connection with the strike the following instructions are to be observed:

1. No employes of the Florida East Coast Railway represented by our organization will perform any service after the hour set to strike.

Those employed at points where joint service is performed for other roads will on receipt of this letter notify the proper officers of the carrier whose facilities are joint with the Florida East Coast that on and after 6:00 A.M., Eastern Standard Time, January 23, 1963, they will not be on duty, giving the reasons why.

Employes of other railroads, terminals or joint facilities who also perform service for the Florida East Coast and who are not ordered on strike, will discontinue performing any service for the Florida East Coast.

2. All employes on strike will keep away from the company property except such men as are designated certain duties to be performed in furtherance of this strike by authority of the organization.

3. At various points on the carrier system the organizations will arrrange for halls for meeting purposes. Consult the Chairman of the Protective Committee of your Lodge or other authorized representative for information as to the location of the point at which you are to meet. Immediately after the strike becomes effective, all employes except those assigned to immediate picket duty will assemble at the designated meeting halls. All strikers will be expected to register and be available for assignment to picket duty.

Only persons on strike and duly accredited representatives of the organizations will be permitted to be present in the meeting halls, unless otherwise authorized by the Chairman of the meeting.

4. Detailed daily instructions concerning the conduct of the strike will be given at the meeting halls. All strikers will be required to attend such meetings unless on picket duty or excused by the Chairman of the meeting.

5. Every employe must understand that the laws of our organization must be obeyed. Acts of violence of any nature will not be tolerated by the organization.

6. In the conduct of every strike there are numerous irresponsible persons, not members of the organization, who take occasion to engage in acts of violence and disorderly conduct. Such acts are usually attributed to members of the organization and great care should be taken by all employes to avoid associating with such persons.

7. Some carrier officials or their emissaries may endeavor to coerce or mislead you by asserting that employes at other points have not gone on strike or that they have returned to work. Such statements should be ignored and all strikers should apply to their officers and committeemen for information and be governed accordingly. No employe will return to work until the strike is officially terminated.

8. Employes on picket duty are expressly instructed to grant permission to train and engine service employes to cross picket lines to the extent necessary

to bring passenger trains that are en route at the time strike is called to their destination and to bring freight trains that have already left a terminal to their next terminal. We wish to avoid the harm that would be caused to the public by leaving passengers or freight stranded en route at the time the strike is called. Employes of classes or crafts other than the crafts on strike are requested to refrain from crossing picket lines except to the extent herein indicated.

9. The Chairman of the Protective Committee of your Lodge will be instructed as to his duties by the General Chairman and Grand Lodge Officers.

10. *Special Instructions for Employes in Certain Occupations.*

Precautions to be taken. Employes should make every possible effort to deliver any perishable freight they have on hand to the consignee; remit ALL company cash to the proper official, or designated depository without regard to the regular remittance period, place valuables in the safe or other safe depository, properly secure ticket cases, cut out telegraph and dispatchers' telephone instruments (at points where they are installed) so that through circuits may be protected; set your signal or signals in the manner prescribed or required of an employe going off duty, lock up freight house and ticket office and be sure every-thing is safe before you leave your station. Take your keys with you and retain them until properly checked out by a duly authorized representative of the railroad.

Express Agents. Railroad Station Agents who handle express for the REA Express should make every possible effort to deliver to consignee all perishable goods which may be on hand prior to the period the strike becomes operative. Valuable packages which cannot be delivered should be reshipped to some division office of the Express Company for safekeeping. No shipment of perishable, valuable or other important freight should be received just prior to the strike period on account of damage or inconvenience which might be caused by delay. After the strike period arrives, no shipments of any kind should be received or forwarded, nor should any attention be paid to Route Agents or other officials who may try to induce Agents to transact business of the company.

You should notify the citizens in your locality of the pending strike in order they may not be unduly inconvenienced thereby and have time to make the necessary arrangements to protect themselves.

All funds due the Express Company should be remitted and receipt taken for the remittance.

Bond and Indemnity Relations. Station Agents, Cashiers and other bonded employes have the same right to cease their employment and relinquish their responsibilities as all other citizens of the United States. You should, therefore, pay no attention to plausible misstatements which may be made by railroad or express officials who may try to influence you to remain in the service on the grounds that you are bonded and liable. You are not liable under the law for anything that transpires at your station after you cease employment and should either the railroad or

the Express Company or any person attempt to work an injury on you, your organization will defend you in the courts or elsewhere without regard to trouble or expense.

United States Mail. Railroad employes, required to handle United States mail by the railroads, are not in the Government service and, therefore, no legal obligations rest upon them to perform this service. The railroads have contracts with the Government for the performance of this service, for which they receive payments, while the employes are required by the railroads to handle the mail without payment therefor. When the strike period arrives you will decline to perform this service in the same manner as all other service.

11. The Railroad Retirement Board has been advised of this action and will designate representatives for the purpose of your filing for unemployment compensation. Their names and locations will be furnished to you at a later date.

12. You will keep this circular private; read it carefully and carry out its provisions to the letter so far as it applies to you; see others directly interested and in the event they fail to receive a copy, instruct them in accordance with the terms set forth herein. Failure to receive this circular is no excuse, member and non-member, is expected to obey the strike order which has been issued and any person remaining in the service after the strike is on will be designated as a strikebreaker.

13. Clearly defined cases of disloyalty or indif-

ference on the part of any person involved in the strike should be reported to the organization and necessary action, either as to discipline or safety measures, taken at once.

It is understood that similar instructions are being issued by the duly authorized representatives of the other cooperating organizations. The cooperating organizations involved in this dispute are:

International Brotherhood of Boilermakers, Brotherhood Railway Carmen of America, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Association of Machinists
Sheet Metal Workers' International Association
International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Brother of Maintenance of Way Employes
The Order of Railroad Telegraphers
Brotherhood of Railroad Signalmen
Hotel and Restaurant Employees and Bartenders International Union

14. Your officers are convinced that a firm stand at this time will result in a victory for you in this important situation and have full confidence in your courage and integrity.

THE STRIKE IS AUTHORIZED AND CALLED IN ACCORDANCE WITH THE CONSTITUTION AND BY-LAWS OF OUR ORGANIZATION AFTER COMPLYING WITH ALL OF THE APPLICABLE PROVISIONS AND REQUIREMENTS OF THE RAILWAY LABOR ACT.

Sincerely and fraternally,

(Signed) N. B. HOWARD
General Chairman

(Signed) J. D. BEARDEN
Vice Grand President

APPROVED:
/s/ G. M. HARRISON
Grand President

DEFENDANT'S EXHIBIT H

Filed: May 27, 1964

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS

Freight Handlers, Express and Station Employes
Florida East Coast Railway
System Board of Adjustment
Flamingo Lodge 751
Financial Secretary & Treas.
D. S. Cooper
1330 S. W. 59 Avenue
Miami, Florida
August 28, 1963
File MRI

C. L. Dennis
Grand President

Dear Sir and Brother:

Please be advised that charges were brought against Anne M. Wright card No. 590 Lodge 751 at regular meeting August 8, 1963 by E. W. Pollard a member in good standing - She was furnished a copy of these charges and notified to appear for hearing before Special Committee August 21, 1963.

This Special Committee met as called at 8 p. m. August 21st 1963, minutes of said meeting attached.

As Anna M. Wright failed to appear as instructed, she was in accordance with Section 4, Article 10, Status for the Government of Lodges, found in Contempt and therefore expelled from membership in our Brotherhood.

Sincerely and fraternally

(Signed) DENVER S. COOPER
F. S. T. Lodge 751

cc: DKC-DLO
WFH-GC

BROTHERHOOD OF RAILWAY AND
STEAMSHIP CLERKS

Freight Handlers, Express and Station Employes
District Chairman
R. H. Schnarr
2645 N.W. 23 Avenue
Miami, Florida

Florida East Coast Railway
System Board of Adjustment
Flamingo Lodge 751
Financial Secretary & Treas.
D. S. Cooper
1330 S. W. 59 Avenue
Miami, Florida

August 21, 1963

Minutes of Meeting
Held 8 P. M., August 21,
1963
1400 N. W. 36th Street
Miami, Florida

Meeting called to order 8 P. M., by D. S. Cooper, Chairman of Committee, who opened session thusly:

"This special committee stands convened to hear any defense by Ann M. Wright in answer to charges brought by Brother E. W. Pollard as follows:

'I, E. W. Pollard, being a member in good standing of Flamingo Lodge 751,

charge that Ann M. Wright, a member of Flamingo Lodge 751, violated Article 2, Section 4 of the Protective Laws of our Brotherhood as set forth and in the stipulated manner as follows.

On or about June 10, 1963, Ann M. Wright did accept and perform work for the strike-bound F.E.C. Railway and did bid on and was assigned to position of Steno-Clerk in the office of the Assistant Freight Traffic Manager, Miami, Florida, as per Bulletin 1963-4, dated June 18, 1963 and signed by F. P. Oldfather, A.F.T.M.

I make this charge in compliance with Article 10, Sec. 2, Statutes for the Government of Lodges.'

As it is clearly evident that defendant Ann M. Wright either refuses or neglects to stand trial as outlined in Article 10, Sec. 3, Page 94 of Statues for Government of Lodges, it is our duty to find said defendant in contempt which report shall be conclusive and punishment expulsion.

Attested: DENVER S. COOPER
D. S. Cooper, Chairman
(Signed) SUSANNA M. MARCHUE
Susanna M. Marchue, Sec'y.
(Signed) K. M. McKINNON
K. M. McKinnon, Recorder

Committeemen:

/s/ R. W. HAYES
/s/ LEO PASWK

— — —

Miami, Florida
August 8, 1963

Mr. R. W. Hayes, President
Flamingo Lodge No. 751
Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express and Station Employes

Dear Sir and Brother:

The System Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, issued a bulletin dated January 16, 1963 and entitled "Strike Call and Instructions Pertaining to Conduct of Strike" time and date of strike, "Acting pursuant to the Constitution and Laws of our organization, a strike of the employes we represent on the Florida East Coast Railway is hereby called to commence on Wednesday, January 23, 1963, at 6 A. M., Eastern Standard Time." This bulletin is signed by Mr. F. W. Howard, General Chairman and approved by Mr. Geo. M. Harrison, Grand President and Mr. J. D. Bearden, Vice President.

Article 2 -Protective Laws-

"Section 4. Any action taken by the Board of Adjustment in conformity with the foregoing Sections of this article shall be law to all mem-

bers in the service of the employer involved, and members not complying therewith shall by subjected to expulsion."

I, E. W. Pollard, being a member in good standing in Flamingo Lodge no. 751, Charge that Miss Anna M. Wright, a member of Flamingo Lodge no. 751, violated Article 2, Section 4, of the Protective Laws of our Brotherhood, as set forth and in the stipulated manner as follows:

On or about June 10, 1963, Miss Anna M. Wright did accept and preform work for the strike-bound Florida East Coast Railway and did bid on and was assigned to Position of Stenographer-Clerk in the office of the Assistant Freight Traffic Manager, Miami, Florida, as per bulletin 1963-4, dated June 18, 1963, and signed by F. P. Oldfather, Assistant Freight Traffic Manager.

I make this charge in compliance with Article 10 Section 2, Statutes for the Government of Lodges.

Article 10 Statutes for the Government of Lodges-
Charges, Trials and Penalties

"Section 2. No member shall be placed on trial for any offence involving a fine, reprimand, suspension (except for nonpayment of dues), or expulsion except that he be first served with specific written charges, given a reasonable time to prepare his defence and afforded a full and fair hearing. Charges Speci-

fying the offence shall be submitted to the lodge in writing, signed by a member in good standing, and a copy thereof promptly furnished the accused member by the Secretary of the Lodge."

Fraternally yours,

(Signed) E. W. POLLARD
E. W. Pollard
Membership card No. 4443

— — —

FLORIDA EAST COAST RAILWAY COMPANY

J. Turner Butler And William A. Hallowes, Trustees
Freight Traffic Department

300 S. W. 1st Ave., P. O. Box 2985
Miami 32, Fla.

Please refer to file no.

August 19, 1963

F. P. Oldfather
Assistant Freight Traffic Manager
R. E. Bolick
District Freight Agent
W. M. Thompson, Jr.
A. J. Westbrook,
J. F. Parker,
Commercial Agent

Mrs. Martiel G. Scanlon, Recording Secretary
Flamingo Lodge 751

c/o Mr. Denver S. Cooper
1330 S. W. 59th Avenue
West Miami, Florida

Dear Mrs. Scanlon:

I have your letter of August 12, 1963, notifying me of charges which were brought against me at the regular meeting of the Lodge on August 8, 1963, those charges being based upon my return to work for the Railway during the period of the strike called by the Clerks' Organization.

Section XII of the Florida Constitution, as amended November 7, 1944, provides that:

> "The right of person to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization;. . . ."

While I recognize that the Supreme Court of the United States has held that the Railway Labor Act supersedes those portions of any State Laws in conflict therewith, I know of no provision in the Railway Labor Act which prohibits me from working for any company, regardless of whether that company is engaged in a work stoppage or not. Therefore, the 'right to work amendment' of the Florida Constitution governs in this particular case and any action which might be brought against me by the Organization to penalize me for returning to work with the Railway will be in violation thereof and, consequently, illegal and invalid.

Yours very truly,

(Signed) ANNA M. WRIGHT
Anna M. Wright

DEFENDANT'S EXHIBIT I

Filed: May 27, 1964

BROTHERHOOD OF RAILWAY AND
STEAMSHIP CLERKS

Freight Handlers, Express and Station Employes
Florida East Coast Railway
System Board of Adjustment

Certified Mail

Flamingo Lodge 751
Financial Secretary & Treas.
D. S. COOPER
1330 S.W. 59 Avenue
Miami, Florida

April 13, 1964
MRI-751

Anna M. Wright
P. O. Box 2985
Miami, Florida

Dear Miss Wright:

Please be advised; your application for reinstate
ment in the Brotherhood of Railway Clerks, wa
presented to the Lodge in session at regular meetin
April 9, 1964: Also please be advised that said ap
plication was voted upon and rejected.

I am returning herein application and your check for reinstate fee.

In accordance with Article 2 Section 4 Page 76 Statutes for the Government of Lodges. (Illegible) nor reapply until a period of three (3) months has elapsed.

Sincerely

(Signed) DENVER S. COOPER

DEFENDANT'S EXHIBIT L

Filed: May 27, 1964

JOINT PROTECTIVE BOARD -
FLORIDA EAST COAST RAILWAY
Brotherhood Railway Carmen of America
Affiliated With AFL-CIO

Office of R. M. Cooke, General Chairman
P. O. Box 34 or 1202 Live Oak Street
New Smyrna Beach, Florida

February 8, 1963

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. R. W. Wyckoff, Assistant Vice President
and Director of Personnel,
Florida East Coast Railway Company,
St. Augustine, Florida

Dear Sir:

From newspaper and radio reports we have learned the the Florida East Coast Railway Company is now advertising certain jobs to our involved crafts (non-operation) and are making calls to these employes to report or return to service with this Railway.

Please be advised that the employes that I represent have withdrawn from the service of the Florida East Coast Railway Company on a legal strike and that such employes are not subject to call for service.

Yours very truly,

(Signed) R. M. COOKE
R. M. Cooke,
General Chairman,
Brotherhood Railway Carmen
of America

— — —

St. Augustine, Florida,
February 12, 1963.

2

Mr. R. M. Cooke, General Chairman,
Brotherhood of Railway Carmen of America,
P. O. Box 34,
New Smyrna Beach, Florida.

Dear Sir:

I have your letter of February 8, 1963, reading as follows:

> "From newspaper and radio reports we have learned that certain jobs to our involved crafts (non-operating) and are making calls to these employes to report or return to service with this Railway.
>
> "Please be advised that the employes that I represent have withdrawn from the service of the Florida East Coast Railway Company on a legal strike and that such employes are not subject to call for service."

Several jobs covering work falling within the scope of the schedule Agreement between System Federation No. 69 and the Florida East Coast Railway have been advertised subsequent to 6:00 A.M., January 23, 1963, the time at which work stoppage was begun by employes represented by Eleven Cooperating Railway Labor Organizations. while these bulletins have been issued in accordance with the procedures prescribed by the subject Agreement, no employe is being forced against his desires to resume work on the subject positions.

Yours very truly,

R. W. Wyckoff
Assistant Vice President and
Director of Personnel.

RWW-1

II. EXHIBITS EXCLUDED AT HEARING OF MAY 26, 27 AND 28, 1964

DEFENDANT'S EXHIBIT T

St. Augustine, Florida
May 18, 1964
2

Mr. F. A. O'Neill, Jr., Chairman
National Mediation Board
National Rifle Association Building
1230 16th Street, N. W.
Washington 25, D. C.

Dear Mr. O'Neill:

I have your letter of May 14, 1964 in reply to mine of April 21, April 28, and May 5, 1964, directing your attention to the sizeable number of cases involving the Florida East Coast Railway Company and the various Labor Organizations which have been docketed for mediation by the National Mediation Board for extended periods of time but on which no mediator has been assigned to commence active mediation.

In the second paragraph of your letter you state that:

> "You can well understand the inability of this Board to conduct meaningful mediation efforts as to those matters which are currently being litigated either by one of the unions concerned or the Department of Justice. However, the Board will assign a mediator to handle all docketed cases wherein compliance with the Railway Labor Act is not in issue."

This statement is typical of the obvious inconsistent

handling by your Board, insofar as the Florida East Coast Railway Company is concerned, ever since the dispute over which the Eleven Non-Operating Labor Organizations went on strike January 23, 1963 was first docketed with your Board. The case docketed as number A-7026 on October 11, 1963, involving cancellation of the Union Shop Agreement with the Brotherhood of Railroad Trainmen, did not become a matter of litigation in the Courts until February 24, 1964. Cases docketed as No. A-7027, cancellation of Union Shop Agreements with various Labor Organizations and A-7055, revision of Working Agreements of various Labor Organizations, were docketed by your Board on October 11, and 31, 1963, respectively and did not become matters of litigation until April 30, 1964. Notwithstanding the extended periods of time which intervened between the dates that these cases were docketed for mediation by your Board and the dates that they became matters of litigation, you have the temerity to use such litigation as an excuse to evade the obvious failure of your Board to discharge its obligations as set forth in Section 5, First of the Railway Labor Act to:

> ". . . promptly put itself in communication with the parties to . . . controversy and . . . use its best efforts by mediation, to bring them to agreement."

It is also significant to note that although Cases Nos. A-7027 and A-7055 were docketed by your Board on October 11, and 31, 1963, respectively, the Justice Department's action of April 30th was just nine (9) days following my letter of April 21, protesting the dilatory tactics of your Board, and two (2) days following my letter of April 28th, again calling attention to the un-

conscionable delay of your Board and requesting that active mediation be commenced without further delay. This has appearance of more than mere coincidence.

Attention is also directed to the fact that until April 30, 1964 only one (1) dispute was a matter of litigation and, notwithstanding this fact, your Board made no apparent effort to commence active mediation in any of the disputes. Had it done so, it is logical to assume that many of the diputes presently pending, including those which are subjects of litigation, could have been successfully disposed of. Thus, the fact that litigation has ensued on any of these disputes is simply another unfortunate occurrence which must be laid at the doorstep of your Board as a result of its apparent unwillingness to discharge its obligations as a neutral agency in the manner contemplated by previously referred to Section 5, First of the Railway Labor Act.

I am pleased to learn that it is the Board's plan, even though belated, to assign Mediator Frank K. Switzer to cases now standing on the open docket and I assume that these cases will be mediated in the order in which they have been doceted by your Board, in the manner contemplated by the Railway Labor Act, irrespective of whether they are matters of litigation or not, without further attempt at what appears to be a designed effort on the part of your Board to manipulate its functions in such a manner as to pressure the Management of the Railway into a settlement favorable to the Labor Organizations.

Yours sincerely,

(Signed) R. W. WYCKOFF
Vice President and
Director of Personnel

RWW/p
cc: Hon. W. Willard Wirtz
bc: Mr. Edward Ball, Chairman of the Board)
bc: Mr. W. L. Thornton, President)
With copy of Mr. O'Neill's
letter of May 14, 1964 attached.

— — —

NATIONAL MEDIATION BOARD
WASHINGTON
20572

OFFICE OF THE CHAIRMAN

May 14, 1964

Mr. R. W. Wyckoff
Assistant Vice President and
Director of Personnel
Florida East Coast Railway Co.
St. Augustine, Florida

Dear Mr. Wyckoff:

Acknowledgment is made of your letters of April 21, April 28, and May 5, 1964, all on the subject of the various cases involving the Florida East Coast Railway Company and certain railway labor organizations which have been docketed by this Board for mediation.

You can well understand the inability of this Board to conduct meaningful mediation efforts as to those matters which are currently being litigated either by one of the unions concerned or the Department of Justice. However, the Board will assign a mediator to handle all docketed cases wherein compliance with the Railway Labor Act is not in issue.

It is the Board's plan to assign Mediator Frank K. Switzer to cases now standing on the open docket to which the above remarks apply, and such assignment will be made in the very near future. We will advise you when Mediator Switzer is assigned to handle these cases.

Very truly yours,

(Signed) FRANCIS A. O'NEILL, JR.
Francis A. O'Neill, Jr.
Chairman

cc: Frank K. Switzer

— — —

NATIONAL MEDIATION BOARD
WASHINGTON

May 11, 1964

Mr. R. W. Wyckoff
Assistant Vice President and
Director of Personnel
Florida East Coast Railway Company
St. Augustine, Florida

Dear Mr. Wyckoff:

This will acknowledge your letters of April 21, April 28, and May 5, 1964, all addressed to Chairman Francis A. O'Neill, Jr., of this Board, calling attention to the sizable number of cases involving the Florida East Coast Railway Company and various labor organiza-

tions which have been doceted for mediation for extended periods of time.

We regret very much that an earlier acknowledgment has not been made of these letters. Mr. O'Neill has been engaged practically continuously for the last several weeks in the negotiations concerning the national rules disputes between the various carriers and the operating railway labor organizations.

However, the subject of your letter is under active consideration by the membership of this Board and expect to be in position to advise you definitely on the subject within the next few days.

Very truly yours,

(Signed) E. C. THOMPSON
E. C. Thompson
Executive Secretary

cc: Honorable W. Willard Wirtz
Secretary of Labor

Received May 13, 1964

St. Augustine, Florida
May 5, 1964
2

Mr. F. A. O'Neill, Jr., Chairman,
National Mediation Board,
National Rifle Association Building,
1230 16th Street, N. W.
Washington 25, D. C.

Dear Mr. O'Neill:

Further with regard to my letter to you dated April 21, 1964, calling attention to the sizeable number of cases involving the Florida East Coast Railway Company and various Labor Organizations, docketed for mediation by your Board for extended periods of time, but on which you have failed to assign a Mediator to engage in mediation.

To this writing I have not had the courtesy of a reply. Neither have you taken any apparent action to assign a Mediator to engage in active mediation on the involved cases. Section 5, First, of the Railway Labor Act provides that the parties, or either party, to a dispute may invoke the services of the Mediation Board in cases such as are here involved, and that:

> ". . . the said Board shall promptly put itself in communication with the parties to such controversy and shall use its best efforts by mediation, to bring them to agreement."

Thus, the Railway Labor Act contemplates that the National Mediation Board shall expeditiously handle

all disputes. The record set forth in my letter of April 21, 1964, however conclusively establishes the dilatory tactics of your Board, as well as the sending of a Mediator to the property on cases involving the International Association of Railway Employees docketed since January 1, 1964, and failing to assign a Mediator to engage in mediation of other cases docketed with your Board for considerably longer periods of time in what appears to be a deliberate manipulation of the cases. Therefore, I demand that you either promptly assign a Mediator to commence active mediation on those disputes pending before your Board in the order in which they have been docketed, or terminate the Board's services in these disputes without further delay.

Please let me have your prompt reply.

Yours sincerely,

(Signed) R. W. WYCKOFF
Assistant Vice President and
Director of Personnel.

RWW-1
cc: Hon. W. Willard Wirtz.

bc: Mr. Edward Ball, Chairman of the Board.
Mr. W. L. Thornton, V. P. and Chief Operating Officer.

St. Augustine, Florida
April 28, 1964
2

Mr. F. A. O'Neill, Jr., Chairman,
National Mediation Board,
National Rifle Association Building,
1230 16th Street, N. W.
Washington 25, D. C.

Dear Mr. O'Neill:

On April 21, 1964 I wrote you concerning the sizeable number of cases involving the Florida East Coast Railway Company and various Labor Organizations which have been docketed for mediation by your Board, many for a considerable period of time, without any action being taken by your Board to assign a mediator to engage in active mediation thereon.

Included in the list of cases was case docketed by your Board as No. A-7056. Although your Board has not notified the Railway that it has closed its file on this case, I forwarded to your Mr. E. C. Thompson, Executive Secretary, copy of my letter of March 9, 1964 to the Organizations involved; namely, General Chairman D. G. Lemmon of the Brotherhood of Locomotive Engineers, General Chairman T. C. Bolin of the Order of Railway Conductors and Brakemen, and General Chairman W. T. Kitt of the Brotherhood of Locomotive Firemen and Enginemen, withdrawing the Railway's notice of September 25, 1963 which was the basis of the dispute. I assume that notification of your Board's removal of this case from its docket will be forthcoming in due course; also that active mediation

in the remaining disputes identified in my letter of April 21, 1964, will not be further delayed by your Board.

Yours very truly,

(Signed) R. W. WYCKOFF
Assistant Vice President and
Director of Personnel.

RWW-1

bc: Mr. Edward Ball, Chairman of the Board.

bc: Mr. W. L. Thornton, Vice President and
Chief Operating Officer.

— — —

St. Augustine, Florida
April 21, 1964
2

Mr. F. A. O'Neill, Jr., Chairman
National Mediation Board
National Rifle Association Building
1230 16th Street, N. W.
Washington 25, D. C.

Dear Mr. O'Neill:

I have recently reviewed the sizeable number of cases involving the Florida East Coast Railway Company and various Labor Organizations which have been docketed for mediation by your Board. These Cases include the following:

Parties	*N.M.B. Case No.*	*Date*	*Subject*
F.E.C.—Railroad Yardmasters of America	A-6682*	4/30/62	Rules
—Railroad Yardmasters of America	A-6804 Sub 4	3/11/63	Rates of pay and fringe benefits.
—Brotherhood of Railroad Signalmen	A-6967 Sub 48	7/02/63	Wage increase.
—International Association of Railway Employes	A-6978	7/19/63	Work Rules.
—International Association of Machinists	Sub-No. 68	8/19/63	Rules.
—Brotherhood Railway Carmen of America	"	"	"
—Sheet Metal Workers' International Association	"	"	"

NOTE: (*) Mediation postponed until October 16, 1962 at request of parties.

—International Brotherhood of Boilermakers, Iron Shop Builders, Blacksmiths, Forgers and Helpers	"	"	"	
—International Brotherhood of Electrical Workers	"	"	"	
—International Brotherhood of Firemen & Oilers, Helpers, Round House and Railway Shop Laborers	"	"	"	
F.E.C.—American Train Dispatchers Association	A-7022	10/04/63	Cancellation of Union Shop Agreement	
—Brotherhood of Railroad Trainmen	A-7025	10/11/63	Cancellation of Union Shop Agreement	
—Brotherhood of Railroad Trainmen	A-7026	10/11/63	Cancellation of Union Shop Agreement	

—Brotherhood of Railway Carmen of America	A-7027	10/11/63	Cancellation of Union Shop Agreement
—International Association of Machinists	A-7027	”	”
—International Brotherhood of Electrical Workers	A-7027	”	”
—Sheet Metal Workers International Association	A-7027	”	”
—International Brotherhood of Boilermakers, Iron Ship Builders Blacksmith, Forgers and Helpers	A-7027	”	”
—International Brotherhood of Firemen & Oilers, Helpers, Round House and Railway Shop Laborers	A-7027	”	”

—Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes	A-7027	"	"
—Brotherhood of Maintenance of Way Employes	A-7027	"	"
—The Order of Railroad Telegraphers	A-7027	"	"
—Brotherhood of Railroad Signalmen	A-7027	"	"
—American Railway Supervisors Association	A-7027	"	"
—Railroad Yardmasters of America	A-7027	"	"
F.E.C.—International Association of Railway Employes	A-7027	10/11/63	Cancellation of Union Shop Agreement.

—United Transport Service Employes	A-7027	"	"
—Joint Council Dining Car Employes	A-7027	"	"
—Railroad Yardmasters of America	A-7055	10/31/63	Revision of Working Agreement.
—Brotherhood of Railway and Steamship Clerks,		"	"
Freight, Handlers, Express and Station Employes	A-7055	"	"
—The Order of Railroad Telegraphers	A-7055	"	"
—International Association of Machinists	A-7055	"	"
—International Brotherhood Boilermakers, Iron Ship		"	"
Builders, Blacksmiths, Forgers and Helpers	A-7055	"	"

Forgers and Helpers	A-7055	,,	,,
—Sheet Metal Workers International Association	A-7055	,,	,,
—International Brotherhood of Electrical Workers	A-7055	,,	,,
—Brotherhood Railway Carmen of America	A-7055	,,	,,
—Internationl Brotherhood of Firemen and Oilers	A-7055	,,	,,
—Brotherhood of Railroad Signalmen	A-7055	,,	,,
—Brotherhood of Maintenance of Way Employes	A-7055	,,	,,
—American Train Dispatchers	A-7055	,,	,,
—The American Railway Supervisors Association	A-7055	,,	,,
—United Transport Service Employes	A-7055	,,	,,

—Dining Car Employes' Union, Local 351	A-7055	"	"
F.E.C.—Brotherhood of Locomotive Engineers	A-7056	10/31/63	Revision of Working Agreements.
—Brotherhood of Locomotive Firemen & Enginemen	A-7056	"	"
—Order of Railway Conductors and Brakemen	A-7056	"	"
—International Association of Railway Employes	A-7093	1/06/64	Revised Working Agreement.
—Brotherhood of Locomotive Firemen & Enginemen	A-7103	1/22/64	Wages and fringe benefits.
—International Association of Railway Employes	A-7120	2/24/64	Promotion Rule
—International Association of Railway Employes	A-7124	2/54/64	Wage increase and fringe benefits.

—International Association of Railway Employees	A-7125	2/25/64	Work Rule Change.
—Railway Yardmasters of America	Unknown*	Unknown	Vacation allowance and fringe ebnefit.
—Railroad Yardmasters of Amercia	Unknown*	Unknown	Rates of Pay and fringe benefits.

NOTE:—(*) Statement of Railway's position requested by N.M.B., but no further advice received as to docketing of case.

It can be observed, the number of cases docketed for mediation with your Board on this property is sizeable. Many of these cases have been docketed for a considerable period of time without any action being taken by your Board to assign a Mediator to engage in active mediation thereon.

As you know, there presently is in effect on this property a work stoppage called by certain Non-Operating Labor Organizations. That work stoppage had as its origin a demand for increased wages and a rule which would require six (6) months advance notice before abolishing a position. Obviously, before any agreement could be achieved on the demands over which the work stoppage began, all other pending Notices, both by the Organizations and the Railway, would have to be settled. Therefore, the failure of your Board to sign a Mediator to engage in active mediation of the pending disputes can have but one effect — namely, prolonging the present dispute with the Non-Operating Labor Organizations. It seems most unusual that your Board would send a Mediator to the property in cases involving the International Association of Railway Employes, some of which were Mediator to engage in mediation of cases which have been docketed with your Board for a longer period of time, unless this is simply another example of what appears to be an attempt on the part of your Board to manipulate its functions in a manner designed to pressure the Management of the Railway into a settlement favorable to the labor organizations.

Your early reply will be appreciated.

Sincerely yours,

R. W. WYCKOFF
Assistant Vice President and
Director of Personnel

RWW/p
cc: Hon. W. Willard Wirtz
bc: Mr. Edward Ball, Chairman of the Board
bc: Mr. W. L. Thornton, Vice President and
Chief Operating Officer.

III. EXHIBITS OFFERED AND ADMITTED AT HEARING OF NOVEMBER 30, DECEMBER 1 AND 2, 1964

DEFENDANT'S EXHIBIT No. BB

Filed: Nov 30, 1964

(Table on next page)

DECEMBER 31, 1962

	Pre-Strike Freight & Passenger	Passenger Only	Freight Only	Mfg. Bearings	11/2/64 Freight Only	Bulletined 11/2/-11/3/64	Reduction Of Requirements	Additional Needed-If 1st Bull. Filled or Perishable Season	Total Now & Bulletined or To Be Bulletined
Mechanical Dept. (Motive Power)	558	271	281	6	136	52	82	11[1]	199
Maintenance of Way	259	23	236	-	115	6	112	-	121
Communications & Signals Dept.	53	-	53	-	11	7	35	-	18
Transportation Dept.	264	105	159	-	57	26	67	9	92
Accounting Dept.	80	11	69	-	42	17	10	-	59
Freight Traffic Dept.	14	-	14	-	7	4	2	1	12
Personnel Dept.	2	-	2	-	3	1	-	-	4
Stores Dept.	29		29	-	19	1	9	-	20
	1259	410	843	6	390	114	317	21	525

TOTAL NOW & BULLETINED OR TO BE BULLETINED 525

REDUCTION OF REQUIREMENTS 317

TOTAL 842

[1]Six additional jobs bulletined November 7-17.

DEFENDANT'S EXHIBIT FF

Filed: Dec 1, 1964

Robert W. McDougall, President — General Chairman
4631 Post Street
Jacksonville, Florida 32005

Samuel F. Cotton, Vice-President
220 Jacquelyn Drive
Portsmouth, Virginia

Jasper W. Smoak, Secretary-Treasurer
180 N. W. 45th Street
Miami, Florida 33127

DISTRICT LODGE No. 16

INTERNATIONAL ASSOCIATION
OF MACHINISTS

Jacksonville Terminal Co.
Affiliated Lodges

1 7 8 10 23 257 570 659
680 816 1272 2000 2005 2013

November 10, 1964

Mr. V. G. Swindull, General Foreman
Florida East Coast Railway Company
St. Augustine, Florida

Dear Sir:

This will acknowledge receipt of copies of bulletins

addressed to employes we represent inviting bids on certain described positions.

The employes we represent have been instructed not to respond to these bulletins since they are engaged in a legal, authorized strike against your company.

Very truly yours,

(Signed) R. W. McDOUGALL
R. W. McDougall
General Chairman

— — —

JOINT PROTECTIVE BOARD —
FLORIDA EAST COAST RAILWAY

Brotherhood Railway Carmen of America
Affiliated With AFL-CIO
Office of R. M. COOKE, General Chairman
P. O. Box 34 or 1202 Live Oak Street

New Smyrna Beach, Florida

November 9, 1964

General Foreman, W. W. Albury,
Florida East Coast Railway Company
Miami, Florida

General Car Foreman H. W. Roton,
Florida East Coast Railway Company
Ned Smyrna Beach, Florida

Shop Superintendent I. E. Smith,
Florida East Coast Railway Company
New Smyrna Beach, Florida

General Car Foreman O. A. McFarland,
Florida East Coast Railway Company
Bowden, Florida

Dear Sir:

This will acknowledge receipt of copies of bulletins addressed to employes we represent, inviting bids on certain described positions.

The employes we represent have been instructed not to respond to these bulletins since they are engaged in a legal, authorized strike aginst your company.

Yours very truly,

(Signed) R. M. COOKE
R. M. Cooke,
General Chairman

cc:
Mr. Michael Fox, President,
Railway Employes' Department

Received: Nov. 10, 1964

JOINT PROTECTIVE BOARD —
FLORIDA EAST COAST RAILWAY
Brotherhood Railway Carmen of America
Affiliated With AFL-CIO
Office of R. M. COOKE, General Chairman
P. O. Box 34 or 1202 Live Oak Street
New Smyrna Beach, Florida

November 9, 1964

General Foreman W. W. Albury,
Florida East Coast Railway Company
Miami, Florida

General Car Foreman H. W. Roton,
Florida East Coast Railway Company
New Smyrna Beach, Florida

Shop Superintendent I. E. Smith,
Florida East Coast Railway Company
New Smyrna Beach, Florida

General Car Foreman O. A. McFarland,
Florida East Coast Railway Company
Bowden, Florida

Dear Sir:

This will acknowledge receipt of copies of bulletins addressed to employes we represent, inviting bids on certain described positions.

The employes we represent have been instructed not to respond to these bulletins since they are engaged in a legal, authorized strike against your company.

Yours very truly,

(Signed) R. M. COOKE
R. M. Cooke,
General Chairman

cc:
Mr. Michael Fox, President
Railway Employes' Department

Received: Nov. 11, 1964

— — —

BROTHERHOOD OF
RAILWAY AND STEAMSHIP CLERKS

Freight Handlers, Express and Station Employes

FLORIDA EAST COAST RAILWAY
SYSTEM BOARD OF ADJUSTMENT

General Chairman
W. F. HOWARD
1019 Colombo Street
Jacksonville, Florida

General Secretary-Treasurer
FRANCES K. DUBOSE
1735 Parkwood Street
Jacksonville, Florida
November 6, 1964
2-2

Mr. L. H. Hargrove, Freight Claim Agent,
Florida East Coast Railway Company,
St. Augustine, Florida.

Dear Sir:

I am in receipt of copies of Bulletins Nos. AD-63 and AD-64, addressed to Clerks and Other Office Employes.

Please be advised that inasmuch as our Organization is participating in a legally authorized strike against the Florida East Coast Railway Company these employes have been instructed by our Organization not to bid or make application on these bulletins at this time.

Yours very truly,

(Signed) W. F. HOWARD
General Chairman

WFH:MHH

BROTHERHOOD OF
RAILWAY AND STEAMSHIP CLERKS

Freight Handler, Express and Station Employes
FLORIDA EAST COAST RAILWAY
SYSTEM BOARD OF ADJUSTMENT

General Chairman
W. F. Howard
1019 Colombo Street
Jacksonville, Florida

General Secretary-Treasurer
Frances K. DuBose
1735 Parkwood Street
Jacksonville, Florida

November 6, 1964
2-4

Mr. K. E. Williams, Commercial Agent,
Florida East Coast Railway Company,
Fort Lauderdale, Florida.

Dear Sir:

I am in receipt of copy of Bulletin No. FT-17, addressed to Clerks and Other Office and Station Employees.

Please be advised that inasmuch as our Organization is participating in a legally authorized strike against the Florida East Coast Railway Company

these employes have been instructed by our Organization not to bid or make application on this bulletin at this time.

Yours very truly,

(Signed) M. B. HOWARD
General Chairman.

WFH:MHH

— — —

BROTHERHOOD OF
RAILWAY AND STEAMSHIP CLERKS

Freight Handlers, Express and Station Employes
FLORIDA EAST COAST RAILWAY
SYSTEM BOARD OF ADJUSTMENT

General Chairman
W. F. Howard
1019 Colombo Street
Jacksonville, Florida

General Secretary-Treasurer
Frances K. DuBose
1735 Parkwood Street
November 6, 1964
2-2

Mr. I. H. Cooper,
Auditor Freight & Passenger Accounts,
Florida East Coast Railway Company,
St. Augustine, Florida.

Dear Sir:

I am in receipt of copies of Bulletins Nos. AD-54, AD-55, AD-56, AD-57, AD-58, AD-59, AD-60, AD-65 and AD-67.

Please be advised that inasmuch as our Organization is participating in a legally authorized strike against the Florida East Coast Railway Company Clerks and Other Office and Station Employes have been instructed by our Organization not to bid or make application on these bulletins at this time.

Yours very truly,

(Signed) M. B. HOWARD
General Chairman.

WFH:MHH

BROTHERHOOD OF
RAILWAY AND STEAMSHIP CLERKS

Freight Handlers, Express and Station Employees

FLORIDA EAST COAST RAILWAY
SYSTEM BOARD OF ADJUSTMENT

General Chairman
W. F. Howard
1019 Colombo Street
Jacksonville, Florida

General Secretary-Treasure
Frances K. DuBose
1735 Parkwood Street
Jacksonville, Florida

November 6, 1964
2-2

Mr. L. W. Flynt, Manager of Stores,
Florida East Coast Railway Company,
St. Augustine, Florida.

Dear Sir:

I am in receipt of copy of your Bulletin No. SD-5

Please be advised that inasmuch as our Organi
tion is participating in a legally authorized str
against the Florida East Coast Railway Comp
clerical and other office and station employes h

been instructed by our Organization not to bid or make application on this bulletin at this time.

Yours very truly,

(Signed) M. B. HOWARD
General Chairman.

WFH:MHH

— — —

BROTHERHOOD OF
RAILWAY AND STEAMSHIP CLERKS

Freight Handlers, Express and Station Employes

FLORIDA EAST COAST RAILWAY
SYSTEM BOARD OF ADJUSTMENT

General Chairman
W. F. Howard
1019 Colombo Street
Jacksonville, Florida

General Secretary-Treasurer
Frances K. DuBose
1735 Parkwood Street
Jacksonville, Florida

November 6, 1964
2-3

Mr. E. H. McLaughlin, Jr., Trainmaster,
Florida East Coast Railway Company,
New Smyrna Beach, Florida.

Dear Sir:

I am in receipt of copies of Bulletins Nos. 84-CL, 94-CL, 95-CL, 95-CL Corrected, 96-CL and 97-CL, addressed to Clerks and Other Office and Station Employees.

Please be advised that inasmuch as our Organization is participating in a legally authorized strike against the Florida East Coast Railway Company these employes have been instructed by our Organization not to bid or make application on these bulletins at this time.

Yours very truly

(Signed) M. B. HOWARD
General Chairman.

WFH:MHH

Received: Nov. 8, 1964

BROTHERHOOD OF
RAILWAY AND STEAMSHIP CLERKS

Freight Handlers, Express and Station Employees

FLORIDA EAST COAST RAILWAY
SYSTEM BOARD OF ADJUSTMENT

General Chairman
W. F. Howard
1019 Colombo Street
Jacksonville, Florida

General Secretary-Treasurer
Frances K. DuBose
1735 Parkwood Street
Jacksonville, Florida

November 6, 1964
2-2

Mr. R. W. Wyckoff,
Vice President & Director of Personnel,
Florida East Coast Railway Company,
St. Augustine, Florida.

Dear Sir:

I am in receipt of copy of Bulletin No. PD-3, addressed to Clerks and Other Office and Station Employes.

Please be advised that inasmuch as our Organization is participating in a legally authorized strike

against the Florida East Coast Railway Company these employes have been instructed by our Organization not to bid or make application on these bulletins at this time.

Yours very truly,

(Signed) M. B. HOWARD
General Chairman.

WFH:MHH

— — —

BROTHERHOOD OF
RAILWAY AND STEAMSHIP CLERKS

Freight Handlers, Express and Station Employes

FLORIDA EAST COAST RAILWAY
SYSTEM BOARD OF ADJUSTMENT

General Chairman
W. F. Howard
1019 Colombo Street
Jacksonville, Florida

General Secretary-Treasurer
Frances K. DuBose
1735 Parkwood Street
Jacksonville, Florida

November 6, 1964
2-2

Mr. C. D. Meitin, Asst. Freight Traffic Manager,
Florida East Coast Railway Company,
St. Augustine, Florida.

Dear Sir:

I am in receipt of your Bulletin No. FT-14, addressed to Clerks and Other Office and Station Employees.

Please be advised that inasmuch as our Organization is participating in a legally authorized strike against the Florida East Coast Railway Company these employes have been instructed by our Organization not to bid or make application on this bulletin at this time.

Yours very truly,

(Signed) M. B. HOWARD
General Chairman.

WFH:MHH

BROTHERHOOD OF
RAILWAY AND STEAMSHIP CLERKS

Freight Handlers, Express and Station Employes

FLORIDA EAST COAST RAILWAY
SYSTEM BOARD OF ADJUSTMENT

General Chairman
W. F. Howard
1019 Colombo Street
Jacksonville, Florida

General Secretary-Treasurer
Frances K. DuBose
1735 Parkwood Street
Jacksonville, Florida

November 6, 1964
2-2

Mr. L. C. Westbrook, General Freight Agent,
Florida East Coast Railway Company,
St. Augustine, Florida.

Dear Sir:

I am in receipt of copies of Bulletins Nos. FT-15 an
FT-16, addressed to Clerks and Other Office and Sta
tion Employees.

Please be advised that inasmuch as our Organiza
tion is participating in a legally authorized strik

against the Florida East Coast Railway Company these employes have been instructed by our Organization not to bid or make application on these bulletins at this time.

Yours very truly,

(Signed) M. B. HOWARD
General Chairman.

WFH:-MHH

— — —

BROTHERHOOD OF
MAINTENANCE OF WAY EMPLOYEES

Affiliated with the American Federation of Labor and Trades and Labor Congress of Canada

SEABOARD FEDERATION
office of
General Chairman
Phone ELgin 4-5107
November 6, 1964

C. L. Winstead
General Chairman

R. O. Morris
Vice Chairman

Room 502 - 218 West Church Street
Jacksonville, Florida 32202
File:

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. E. R. Frederick
Engineer Bridges and Buildings
Florida East Coast Railway Company
St. Augustine, Florida

Dear Sir:

This will acknowledge receipt of copies of Bulletins addressed to employees we represent inviting bids on certain described positions.

The employees we represent have been instructed not to respond to these Bulletins since they are engaged in a legal, authorized strike against your company.

Very truly yours,

(Signed) C. L. WINSTEAD
C. L. Winstead
General Chairman

CLW:ey
cc: Mr. H. C. Crotty
Mr. J. H. Hadley
Mr. J. C. Goodson
Mr. C. A. Beaver

BROTHERHOOD OF
MAINTENANCE OF WAY EMPLOYEES

Affiliated with the American Federation of Labor
and Trades and Labor Congress of Canada

SEABOARD FEDERATION
office of
General Chairman
Phone ELgin 4-5107

November 6, 1964

C. L. Winstead
General Chairman

R. O. Morris
Vice Chairman

Room 502 - 218 West Church Street
Jacksonville, Florida 32202
File:

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. R. H. Tedrick, Roadmaster
Florida East Coast Railway Company
St. Augustine, Florida

Dear Sir:

This will acknowledge receipt of copies of Bulletins addressed to employees we represent inviting bids on certain described positions.

The employees we represent have been instructed not to respond to these Bulletins since they are engaged in a legal, authorized strike against your company.

Very truly yours,

(Signed) C. L. WINSTEAD
C. L. Winstead
General Chairman

CLW:ey
cc: Mr. H. C. Crotty
Mr. J. H. Hadley
Mr. J. C. Goodson
Mr. C. A. Beaver

Received Nov. 9, 1964.

— — —

THE ORDER OF RAILROAD TELEGRAPHERS
FLORIDA EAST COAST RAILWAY
SYSTEM DIVISION No. 87

I. E. HAMILTON, General Chairman

725 Canal Street
New Smyrna Beach, Florida 32069
November 6, 1964

Mr. E. H. Hall
Chief Train Dispatcher
Florida East Coast Railway Company
New Smyrna Beach, Florida

Dear Sir:

This will acknowledge receipt of copies of bulletins addressed to employees we represent inviting bids on certain described positions.

Employees we represent have been instructed not to respond to these bulletins since they are engaged in a legal authorized strike against your Company.

Very truly yours,

(Signed) I. E. HAMILTON
General Chairman

Recieved Nov. 9, 1964

— — —

INTERNATIONAL BROTHERHOOD
ELECTRICAL WORKERS
LOCAL No. 888
Miami, Florida

Nov. 10, 1964
18 Poinciana Ave.
St. Augustine, Fla. 32084

Mr. J. M. White, Jr., General Diesel Foreman

Florida East Coast Railway Company
Bowden, Florida

Dear Sir:

This will acknowledge receipt of copies of bulletins addressed to employes we represent inviting bids on certain described positions.

The employes we represent have been instructed not to respond to these bulletins since they are engaged in a legal, authorized strike against your company.

Very truly yours,

(Signed) C. A. DUPONT
C. A. DuPont
Pres. & Gen. Chairman
Local No. 888, I. B. E. W.

— — —

Received Nov. 12, 1964

BROTHERHOOD OF
RAILROAD SIGNALMEN
OF AMERICA

Daytona Beach, Florida
November 9, 1964

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Lodge No. 66

Mr. H. E. Webb,
Superintendent Communications & Signals,
Florida East Coast Railway Company,
Saint Augustine, Florida.

Dear Sir:

This will acknowledge receipt of copies of bulletins addressed to employes we represent inviting bids on certain described positions.

The employes we represent have been instructed not to respond to these bulletins since they are engaged in a legal authorized strike against your company.

Very truly yours,

(Signed) J. E. DUBBERLY,
J. E. Dubberly,
General Chairman, B of R. S.,
Local 66
P. O. Box 6083
Daytona Beach, Florida

cc: Jesse Clark, Pres. BofRS
T. H. Gregg V-Pres. B of R S
C. J. Chamberlain, Sec-Treas., BofRS
W. B. O'Connell GLR BofRS

Received Nov. 12, 1964

DEFENDANT'S EXHIBIT GG

Filed: Dec. 1, 1964

INDIVIDUAL REFUSALS TO REPORT FOR DUTY

Official Addressed				Employee
L. W. Flynt	Form	Notice	11/21	Harry Alexander
I. H. Cooper	"	"	11/21	R. S. Bowe
W. G. Dailey	"	"	11/13	J. A. Howard
G. E. Gatchell	"	"	11/12	C. L. Barnes
I. H. Cooper	"	"	11/12	R. F. Pellicer
I. H. Cooper	"	"	11/12	G. S. Mangus
E. H. McLaughlin, Jr.	Letter		11/12	W. F. Howard
L. C. Westbrook	Form	Notice	11/12	P. B. Triay
L. C. Westbrook	"	"	11/12	Cecelia C. Harde
E. H. McLaughlin, Jr.	Letter		11/14	James H. Bailey
E. H. McLaughlin, Jr.	"		11/13	W. F. Wood
I. H. Cooper	Form	Notice	11/13	S. D. Pinkham
I. H. Cooper	"	"	11/13	T. Q. Brallier
I. H. Cooper	"	"	11/13	Annie S. Watson
L. H. Hargrove	"	"	11/13	W. W. Clifton
L. H. Hargrove	"	"	11/12	Alice G. Whaley
I. H. Cooper	"	"	11/13	J. H. Bradshaw
I. H. Cooper	"	"	11/13	B. A. Smith, Jr.
E. G. Hood	"	"	11/15	Wanna P. Wilson
I. H. Cooper	Letter		11/16	Carrie M. Englis
E. H. McLaughlin, Jr.	"		11/16	T. J. Truett
W. G. Dailey	Form	Notice	11/13	C. W. Autrey
L. C. Westbrook	"	"	11/13	C. T. Lucas, Jr.
R. F. Stack	"	"	11/16	J. B. Kitchens

18 Madeira Drive
St. Augustine, Florida.
November 21, 1964

Mr. L. W. Flynt, Manager of Stores
Florida East Coast Railway Co.
St. Augustine, Florida

Dear Sir:

This will acknowledge receipt of your award bulletin of November 20, 1964, #SD-59, awarding me position of Addressograph Opr, Position No. 8 advertised in your Bulletin No. SD-58, dated November 12, 1964 in accordance with Clerk's Agreement Rule 19.

This is to inform you that I am on a legally authorized strike under the Railway Labor Act and the Railway has been so notified, therefore, I cannot report for duty as long as the strike is on.

Sincerely yours,

(Signed) HARRY ALEXANDER
Harry Alexander

cc: Mr. W. F. Howard, Gen. Chmn.
Brotherhood of Railway Clerks
1019 Colombo Street,
Jacksonville, Florida.

Mr. F. A. Huici, Dist. Chmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464676

Received Nov. 24, 1964

St. Augustine, Florida.
November 12, 1964

Mr. I. H. Cooper
Auditor Freight & Passenger Accounts
Florida East Coast Railway Co.
St. Augustine, Florida

Dear Sir:

This will acknowledge receipt of your award bulletin of Nov. 10, 1964, awarding me position of Rate and Division Clerk advertised in your Bulletin No. AD-65 dated Nov. 2, 1964 in accordance with Clerk's Agreement Rule 19.

This is to inform you that I am on a legally authorized strike under the Railway Labor Act and the Railway has been so notified, therefore, I cannot report for duty as long as the strike is on.

Sincerely yours,
R. S. Bowe
P. O. Box #4
Belle Chase, Louisiana

cc: Mr. W. Howard, Gen. Chmn.
Brotherhood of Railway Clerks
119 Colombo Street,
Jacksonville, Florida.

Mr. F. A. Huici, Dist. Chmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464665

St. Augustine, Florida
12 Willow Drive
November 13, 1964

Mr. W. G. Dailey, Auditor of Disbursements
Florida East Coast Railway Company
200 Malaga Street
St. Augustine, Florida

This will acknowledge receipt of your award bulletin of November 10, 1964 61-a, awarding me position of Accountant Miscellaneous Clerk advertised in your Bulletin No. 61 dated November 2, 1964 in accordance with Clerk's Agreement Rule 19.

This is to inform you that I am on a legally authorized strike under the Railway Labor Act and the Railway has been so notified, therefore, I cannot report for duty as long as the strike is on.

Sincerely yours,

(Signed) J. A. HOWARD
J. A. Howard

cc: Mr. W. F. Howard, Gen. Chmn.
Brotherhood of Railway Clerks
1019 Colombo Street,
Jacksonville, Florida.

Mr. F. A. Huici, Dist. Cmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464667.

Received Nov. 17, 1964

St. Augustine, Florida.
November 12, 1964

Mr. G. E. Gatchell
Manager-Machine Accounting
Florida East Coast Railway Company
St. Augustine, Florida.

This will acknowledge receipt of your award bulletin of November 11, 1964, awarding me position of Accounting Machine Operator (Pos. No. 91) advertised in your Bulletin No. AD 66-AD 66-A dated November 3, 1964 in accordance with Clerk's Agreement Rule 19.

This is to inform you that I am on a legally authorized strike under the Railway Labor Act and the Railway has been so notified, therefore, I cannot report for duty as long as the strike is on.

Sincerely yours,

(Signed) C. L. BARNES
C. L. Barnes
26 McMillan Street
St. Augustine, Fla.

cc: Mr. W. F. Howard, Gen. Chmn.
Brotherhood of Railway Clerks
1019 Colombo Street,
Jacksonville, Florida.

Mr. F. A. Huici, Dist. Chmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464666.

St. Augustine, Florida.
November 12, 1964.

Mr. I. H. Cooper,
Auditor Freight & Passenger Accounts.
St. Augustine, Florida.

Dear Sir:

This will acknowledge receipt of your award bulletin of November 10, 1964 # AD-57-A, awarding me position of Overcharge Claim Investigator Rate & Division Clerk #87 advertised in your Bulletin No. AD 57 dated November 2, 1964 in accordance with Clerk's Agreement Rule 19.

This is to inform you that I am on a legally authorized strike under the Railway Labor Act and the Railway has been so notified, therefore, I cannot report for duty as long as the strike is on.

Sincerely yours,

(Signed) R. F. PELLICER
R. F. Pellicer,
1 Highland Manor,
St. Augustine, Florida.

cc: Mr. W. F. Howard, Gen. Chmn.
Brotherhood of Railway Clerks
1019 Colombo Street,
Jacksonville, Florida.

Mr. F. A. Huici, Dist. Chmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464707.

— — —

St. Augustine, Florida.
November 12, 1946

Mr. I. H. Cooper
Auditor Freight & Passenger Accounts
Florida East Coast Railway Co.
St. Augustine, Florida

Dear Sir:

This will acknowledge receipt of your award bulletin of November 10, 1964, #AD-56-A, awarding me position of Position No. 86, Accounts Clerk advertised in your Bulletin No. AD-56 dated November 2, 1964 in accordance with Clerk's Agreement Rule 19.

This is to inform you that I am on a legally authorized strike under the Railway Labor Act and the Railway has been so notified, therefore, I cannot report for duty as long as the strike is on.

Sincerely yours,

(Signed) G. S. MANGUS
Mr. G. S. Mangus
25 Leonardi Street
St. Augustine, Florida

cc: Mr. W. F. Howard, Gen. Chmn.
Brotherhood of Railway Clerks
1019 Colombo Street,
Jacksonville, Florida.

Mr. F. A. Huici, Dist. Chmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464706.

— — —

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

Florida East Coast Railway
System Board of Adjustment

General Chairman
W. F. Howard
1019 Colombo Street
Jacksonville, Florida

Vice General Chairman and
General Secretary-Treasurer
Frances K. Dubose
1735 Parkwood Street
Jacksonville, Florida

November 12, 1964

Mr. E. H. McLaughlin, Jr., Trainmaster,
Florida East Coast Railway Company,
New Smyrna Beach, Florida.

Dear Sir:

I have your Bulletin No. 113-CL, dated November 11, 1964, awarding Northern Zone Assignment No. 2 to me, and your letter of the same date, without file number, asking me to report to Chief Medical Examiner at Jacksonville on Monday, November 16, 1964, and to report for my assignment on Wednesday, November 18, 1964.

I am on a legally authorized strike under the Railway Labor Act and I cannot report for duty so long as the strike is on.

Your very truly,

(Signed) W. F. HOWARD
W. F. Howard,
1019 Colombo Street,
Jacksonville, Fla. 32207

cc: Mr. R. W. Wyckoff,
Vice President & Director of Personnel,
Florida East Coast Railway Company,
St. Augustine, Florida.

cc: Mr. J. S. Kellett, District Chairman.

St. Augustine, Florida.
November 12, 1964

Mr. L. C. Westbrook, GFA
Florida East Coast Railway Co.
St. Augustine, Florida

Dear Sir:

This will acknowledge receipt of your award bulletin of November 10, 1964, #FT-19, awarding me position of Quotation Clerk advertised in your Bulletin No. FT-15 dated November 2, 1964 in accordance with Clerk's Agreement Rule 19.

This is to inform you that I am on a legally authorized strike under the Railway Labor Act and the Railway has been so notified, therefore, I cannot report for duty as long as the strike is on.

Sincerely yours,

(Signed) P. B. TRIAY
P. B. Triay
111 Coronado Street
St. Augustine, Florida

cc: Mr. W. F. Howard, Gen. Chmn.
Brotherhood of Railway Clerks
1019 Colombo Street,
Jacksonvile, Florida.

Mr. F. A. Huici, Dist. Chmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464704.

Received Nov. 13, 1964

— — —

St. Augustine, Florida.
November 12, 1964

Mr. L. C. Westbrook, GFA
Florida East Coast Railway Co.
St. Augustine, Florida

Dear Sir:

This will acknowledge receipt of your award bulletin of November 11, 1964, #FT-20, awarding me position of Stenographer advertised in your Bulletin No. FT-16 dated November 3, 1964 in accordance with Clerk's Agreement Rule 19.

This is to inform you that I am on a legally authorized strike under the Railway Labor Act and the Railway has been so notified, therefore, I cannot report for duty as long as the strike is on.

Sincerely yours,

(Signed) CECELIA C. HARDEMAN
(Mrs.)

Cecelia C. Hardeman
P. O. Box 1301
St. Augustine, Florida

cc: Mr. W. F. Howard, Gen. Chmn.
Brotherhod of Railway Clerks
1019 Colombo Street,
Jacksonville, Florida.

Mr. F. A. Huici, Dist. Chmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464705.

Received Nov. 16, 1964

— — —

Jacksonville, Florida
Nov. 14th, 1964

Mr. E. H. McLaughlin, Jr.
Trainmaster F. E. C. Rwy.
New Smyrna Beach, Fla.

Dear Sir:

As I am on legal authorized strike against the Florida East Coast Railway Company under the Railway Labor Act, I will be unable to report for duty as Teller-Accountant-Stenographer at Jacksonville Freight Agency, Wednesday, November 18, 1964 as per your Bulletin No 114-CL dated Nov. 11, 1964, until such time as the strike is duly settled.

Yours respectfully,

(Signed) JAMES H. BAILEY

Copies: Mr. Wyckhoff
Mr. Howard
Received Nov. 16, 1964

2041 Camden Ave.
Jacksonville, Fla.
November 13, 1964

Mr. E. H. McLaughlin, Jr.,
Trainmaster,
New Smyrna Beach, Fla.

Replying to your letter of November 11, 1964, without file number, with reference to my assignment to Position No. 5, Chief Bill Clerk, Jacksonville Agency your bulletin No. 115-CL.

Account on being on legally authorized strike, I will be unable to protect this assignment.

(Signed) W. F. WOOD
W. F. Wood

cc: Mr. W. F. Howard

Received Nov. 16, 1964

— — —

St. Augustine, Florida.
5 Ponce de Leon Avenue
November 13, 1964

Mr. I. H. Cooper, AF&PA
Florida East Coast Railway Company
200 Malaga Street
St. Augustine, Florida

This will acknowledge receipt of your award bulletin

of November 10, 1964 #AD58A, awarding me position of Head Refrigeration Clerk advertised in your Bulletin No. AD-58 dated November 2, 1964 in accordance with Clerk's Agreement Rule 19.

This is to inform you that I am on a legally authorized strike under the Railway Labor Act and the Railway has been so notified, therefore, I cannot report for duty as long as the strike is on.

Sincerely yours,

(Signed) S. D. PINKHAM
S. D. Pinkham

cc: Mr. W. F. Howard, Gen. Chmn.
Brotherhood of Railway Clerks
1019 Colombo Street,
Jacksonville, Florida.

Mr. F. A. Huici, Dist. Chmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464662.

St. Augustine, Florida.
26 Riberia Street
November 13, 1964

Mr. I. H. Cooper, AF&PA
Florida East Coast Railway Company
200 Malaga Street
St. Augustine, Florida

This will acknowledge receipt of your award bulle
of November 10, 1964 No. AD-60-A awarding me positi
of Abstract Machine Operator-Clerk advertised in yo
Bulletin No. AD-60 dated November 2, 1964 in accor
ance with Clerk's Agreement Rule 19.

This is to inform you that I am on a legally auth
ized strike under the Railway Labor Act and the Ra
way has been so notified, therefore, I cannot report
duty as long as the strike is on.

Sincerely yours,

(Signed) T. Q. BRALLIER
T. Q. Brallier

cc: Mr. W. F. Howard, Gen. Chm.
Brotherhood of Railway Clerks
1019 Colombo Street,
Jacksonville, Florida.

Mr. F. A. Huici, Dist. Chmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464661.

St. Augustine, Florida.
10 Alfred Street
November 13, 1964

Mr. I. H. Cooper, AF&PA
Florida East Coast Railway Company
200 Malaga Street
St. Augustine, Florida

This will acknowledge receipt of your award bulletin of November 10, 1964 AD 59-A, awarding me position of Clerk, File Clerk & Calculating Mch. Opr. advertised in your Bulletin No. AD-59 dated November 2, 1964 in accordance with Clerk's Agreement Rule 19.

This is to inform you that I am on a legally authorized strike under the Railway Labor Act and the Railway has been so notified, therefore, I canot report for duty as long as the strike is on.

Sincerely yours,

(Signed) ANNIE S. WATSON
Annie S. Watson

cc: Mr. W. F. Howard, Gen. Chmn.
Brotherhood of Railway Clerks
1019 Colombo Street,
Jacksonville, Florida.

Mr. F. A. Huici, Dist. Chmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464663.

St. Augustine, Florida.
P. O. Box 822
November 13, 1964

Mr. L. H. Hargrove, Frt. Claim Agt.
Florida East Coast Railway Company
200 Malaga Street
St. Augustine, Florida

This will acknowledge receipt of your award bulletin of November 10, 1964 AD63A, awarding me position of Claim Clerk advertised in your Bulletin No. AD-63 dated November 2, 1964 in accordance with Clerk's Agreement Rule 19.

This is to inform you that I am on a legally authorized strike under the Railway Labor Act and the Railway has been so notified, therefore, I cannot report for duty as long as the strike is on.

Sincerely yours,

(Signed) W. W. CLIFTON
W. W. Clifton

cc: Mr. W. F. Howard, Gen. Chmn.
Brotherhood of Railway Clerks
1019 Colombo Street,
Jacksonville, Florida.

Mr. F. A. Huici, Dist. Chmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464669.

St. Augustine, Florida.
November 12, 1964

Mr. L. H. Hargrove,
Freight Claim Agent,
St. Augustine, Florida.

Dear Sir:

This will acknowledge receipt of your bulletin of November 10, 1964 #AD-63-A, awarding me position of Claim Investigator #77 advertised in your Bulletin No. AD-63 dated November 2, 1964 in accordance with Clerk's Agreement Rule 19.

This is to inform you that I am on a legally authorized strike under the Railway Labor Act and the Railway has been so notified, therefore, I cannot report for duty as long as the strike is on.

Sincerely yours,

(Signed) ALICE G. WHALEY
Mrs. Alice G. Whaley
P. O. Box 994,
St. Augustine, Fla.

cc: Mr. W. F. Howard, Gen. Chmn.
Brotherhood of Railway Clerks
1019 Colombo Street,
Jacksonville, Florida.

Mr. F. A. Huici, Dist. Chmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464664

St. Augustine, Florida.
RFD #1 Box 403-L
November 13, 1964

Mr. I. H. Cooper, AF&PA
Florida East Coast Railway Company
200 Malaga Street
St. Augustine, Florida

This will acknowledge receipt of your award bulletin of November 10, 1964 #AD-55-A, awarding me position of Assistant Head Rate and Division Clerk advertised in your Bulletin No. AD-55 dated November 2, 1964 in accordance with Clerk's Rule 19.

This is to inform you that I am on a legally authorized strike under the Railway Labor Act and the Railway has been so notified, therefore, I cannot report for duty as long as the strike is on.

Sincerely yours,

(Signed) J. H. BRADSHAW
J. H. Bradshaw

cc: Mr. W. F. Howard, Gen. Chmn.
Brotherhood of Railway Clerks
1019 Colombo Street,
Jacksonville, Florida.

Mr. F. A. Huici, Dist. Chmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464672

St. Augustine, Florida.
33 St. George Street
November 13, 1964

Mr. I. H. Cooper, AF&PA
Florida East Coast Railway Company
200 Malaga Street
St. Augustine, Florida

This will acknowledge receipt of your award bulletin of November 10, 1964 #AD-54-A, awarding me the position of Suspense Accounts Clk., Interline & Agy. Accts. Bureau advertised in your Bulletin No. AD-54 dated November 2, 1964 in accordance with Clerk's Agreement Rule 19.

This is to inform you that I am on a legally authorized strike under the Railway Labor Act and the Railway has been so notified, therefore, I cannot report for duty as long as the strike is on.

Sincerely yours,

(Signed) B. A. SMITH, JR.
B. A. Smith, Jr.

cc: Mr. W. F. Howard, Gen. Chmn.
Brotherhood of Railway Clerks
1019 Colombo Street,
Jacksonville, Florida.

Mr. F. A. Huici, Dist. Chmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464670

27 Bayview Drive
St. Augustine, Florida
November 15, 1964

Mr. E. G. Hood
Car Accountant
Florida East Coast Railway Co.
St. Augustine, Fla.

This will acknowledge receipt of your award bulletin of November 13, 1964 #AD-68-A, awarding me the position of Per Diem Clerk Car Record Office advertised in your Bulletin No. AD-68 dated November 5, 1964 in accordance with the Clerk's Agreement Rule 19.

This is to inform you that I am on a legally authorized strike under the Railway Labor Act and the Railway has been so notified, therefore, I cannot report for duty as long as the strike is on.

Sincerely yours,

(Signed) WANNA P. WILSON
Wanna P. Wilson
27 Bayview Drive
St. Augustine, Fla.

cc: Mr. W. F. Howard, Gen. Chmn.
Brotherhood of Railway Clerks
1019 Colombo Street,
Jacksonville, Florida.

Mr. F. A. Huici, Dist. Chmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464674

207 West 40th Street
Jacksonville, Florida
November 16, 1964

Mr. I. H. Cooper, Auditor of Freight & Passenger Accounts
Florida East Coast Railway Company
St. Augustine, Fla.

Dear Mr. Cooper:

I have your Bulletin No. AD-67-A assigning me to position of Rate Revising Clerk, No. 92, and your letter of November 12, 1964, instructing me to report of physical examination on November 16, 1964.

I am on a legally authorized strike, under the Railway Labor Act, and cannot report for duty so long as the strike is on.

Yours very truly,

(Signed) CARRIE M. ENGLISH
Carrie M. English

cc: Mr. W. F. Howard
Mr. J. S. Kellett

Received Nov. 17, 1964

658 Chestnut Drive,
Jacksonville, Florida,
November 16, 1964.

Mr. E. H. McLaughlin, Jr.,
Trainmaster,
Florida East Coast Railway,
New Smyrna Beach, Florida.

Referring to your Bulletin No. 111-C1 of November 11, 1964 assigning me to Clerk Position No. 2 at Melbourne Agency.

As I, along with other employees of my craft, am on a legally authorized strike against the Railway, I will be unable to protect this assignment.

It is noted that I am again receiving correspondence from the officers of the Railway at my old address. My new address above was furnished the former Superintendent in accordance with Clerks' Agreement, and I hold his receipt for same.

(Signed) T. J. TRUETT
T. J. Truett,
Clerk.

cc: Mr. W. F. Howard
Mr. R. W. Wyckoff

Received Nov. 17, 1964

St. Augustine, Florida.
81 Douglas Street
November 13, 1964

Mr. W. G. Daly, Auditor of Disbursements
Florida East Coast Railway Company
200 Malaga Street
St. Augustine, Florida

This will acknowledge receipt of your award bulletin of November 10, 1964 #62-A, awarding me position of Chief Time Clerk - Assistant Accountant advertised in your Bulletin No. 62 dated November 2, 1964 in accordance with Clerk's Agreement Rule 19.

This is to inform you that I am on a legally authorized strike under the Railway Labor Act and the Railway has been so notified, therefore, I cannot report for duty, as long as the strike is on.

Sincerely yours,

(Signed) C. W. AUTREY
C. W. Autrey

cc: Mr. W. F. Howard, Gen. Chmn.
Brotherhood of Railway Clerks
1019 Colombo Street,
Jacksonville, Florida.

Mr. F. A. Huici, Dist. Chmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464671.

Received Nov. 17, 1964

St. Augustine, Florida.
November 13, 1964

Mr. L. C. Westbrook, General Frt. Agt.
Florida East Coast Railway Company
200 Malaga Street
St. Augustine, Florida

This will acknowledge receipt of your award bulletin of November 10, 1964 FT-18, awarding me position of Rate Clerk advertised in your Bulletin No. FT-14 dated November 2, 1964 in accordance with Clerk's Agreement Rule 19.

This is to inform you that I am on a legally authorized strike under the Railway Labor Act and the Railway has been so notified, therefore, I cannot report for duty as long as the strike is on.

Sincerely yours,

(Signed) C. T. LUCAS, JR.
C. T. Lucas, Jr.
C. T. Lucas, Jr.
P. O. Box 55
St. Augustine, Fla.

cc: Mr. W. F. Howard, Gen. Chmn.
Brotherhood of Railway Clerks
1019 Colombo Street,
Jacksonville, Florida.

Mr. F. A. Huici, Dist. Chmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464673.

Received Nov. 18, 1964

— — —

St. Augustine, Florida.
November 16, 1964

R. F. Stack, Trainmaster
Florida East Coast Ry. Co.
Miami, Florida.

This will acknowledge receipt of your award bulletin of November 13, Bulletin No. 116-CL, awarding me position of Seasonal Position No. 3, Utility Clerk, Belle Glade-Chosen advertised in your Bulletin No. 98-CL, dated November 5, 1964 in accordance with Clerk's Agreement Rule 19.

This is to inform you that I am on a legally authorized strike under the Railway Labor Act and the Railway has been so notified, therefore, I cannot report for duty as long as the strike is on.

Sincerely yours,

(Signed) J. B. KITCHENS
J. B. Kitchens
33 Hope St.,
St. Augustine, Fla.

cc: Mr. W. F. Howard, Gen. Chmn.
Brotherhood of Railway Clerks
1019 Colombo Street,
Jacksonville, Florida.

Mr. F. A. Huici, Dist. Chmn.
Brotherhood of Railway Clerks
132 San Marco Avenue
St. Augustine, Florida.

CERTIFIED LETTER NO. 464675

DEFENDANT'S EXHIBIT No. HH

Filed: Dec 1, 1964

Homestead, Florida
November 18th 1964

Mr. E. H. Hall
Chief Train Dispatcher
Florida East Coast Railway
New Smyrna Beach, Florida

Dear Sir:

I am now able and ready to go back to work but on account having to cross the Union Picket Line where I would be working I'm afraid that I will to decline until the Picket Lines are removed.

Yours Very Truly

(Signed) R. S. SPITZ
R. S. Spitz
Opr.

DEFENDANT'S EXHIBIT II

Filed: Dec 1, 1964

EMPLOYMENT SINCE STRIKE*

	Applicants	*Selected*		*Hired*		*Failed To Report*	
		Non-Ops	*Ops*	*Non-Ops*	*Ops*	*Non-Ops*	*Ops*
Jan. 1963	-	-	-	-	-	-	-
Feb.	8	-	-	-	-	-	-
March	14	2	-	1	-	-	-
April	40	20	2	17	2	-	-
May	93	31	5	30	5	-	-
June	207	48	59	41	45	3	9
July	248	84	61	61	47	8	4
August	421	164	62	109	34	6	5
Sept.	318	133	65	90	45	5	4
Oct.	315	109	60	66	35	3	6
Nov.	111	39	10	35	6	1	1
Dec.	260	143	24	92	15	3	2
TOTAL 1963	2035	773	348	542	233	29	31

Jan. 1964	242	82	24	63	13	1	-
Feb.	51	28	1	23	1	1	-
March	103	49	17	41	10	1	1
April	133	42	28	22	20	1	3
May	93	32	5	32	4	4	-
June	77	31	-	20	-	-	-
July	107	63	3	31	3	6	-
Aug.	82	47	-	18	-	4	-
Sept.	102	60	26	28	14	2	1
Oct.	132	40	16	30	14	-	-
TOTAL 10 MONTHS 1964	1122	474	120	308	79	20	5
TOTAL 1963 10 MONTHS 1964	3157	1247	468	850	312	49	36

* — Does not include employes who had previously worked for FEC.

DEFENDANT'S EXHIBIT JJ

Filed: Dec 1, 1964

FLORIDA EAST COAST RAILWAY COMPANY

St. Augustine, Florida,
November 5, 1964

Mr. W. J. Sasser,
Freight Claims Office.

Dear Sir:

When the Railroad resumed operations after the strike, it was necessary, because of the shortage of personnel and the variety of eligibility requirements for holiday pay, to incorporate the holiday pay allowance into the hourly rate. For like reasons, the Railroad, where rates varied for the same job at different points, instituted a single rate for the job which rate was, for the most part, higher than the prior rate paid.

In order to comply fully with the Order of the United States District Court for the Middle District of Florida, Jacksonville Division, in the Non-Ops case, Civil Action No. 64-107-Civ.-J, the Railroad is reinstating the rates of pay as embodied in the collective bargaining agreements of the various non-operating organizations as they existed prior to January 23, 1963. This means that the holiday pay allowance will be removed from your hourly rate and if your rate was one of those for which an average rate was established, it will also be adjusted in strict accord with the applicable collective bargaining agreement. Rules and working conditions

as they existed prior to January 23, 1963, will also be reinstated and maintained. Beginning Friday, 13, November, 1964, your hourly rate, starting time, etc., will be as follows:

TITLE	*RATE*
Claim Clerk	$2.6072 per hour

ASSIGNMENT

DAILY, except Saturday, Sunday and specified holidays

8:00 AM to 12:00 Noon
1:00 PM to 5:00 PM
Meal Period
12:00 Noon - 1:00 PM

Yours very truly,

L. H. Hargrove
Freight Claim Agent

BCopies to:
Mr. R. W. Wyckoff

DEFENDANT'S EXHIBIT KK

Filed: Dec. 2, 1964

FLORIDA EAST COAST RAILWAY COMPANY

St. Augustine, Florida
January 3, 1963

BULLETIN NO. 1

Bids will be received for a period of seven (7) calendar days from date, or until Midnight, January 10, 1963, for one (1) MACHINIST in the Miller Shop Locomotive Department.

This job created account E. R. Osborne transferring in the service.

Working hours are from 7:00 A.M. to 12:00 Noon; 12:30 P. M. to 3:30 P. M., Monday through Friday, except when holidays fall within the assignment.

(Signed) J. D. MAYS
J. D. Mays
General Diesel Foreman

pc

Copies to: Messrs. W. A. Baker
R. W. McDougall
W. Z. Wells

BV NSB BOW Car and Locomotive Departments

Received: Jan. 4, 1963

FLORIDA EAST COAST RAILWAY COMPANY

St. Augustine, Florida
December 24, 1962

BULLETIN NO. 12

Bids will be received for a period of seven (7) calendar days from date, or until Midnight, December 31, 1962, for one (1) MACHINIST in the Miller Shop Locomotive Department.

This job created account R. A. McMullen resigning from the service to make application for railroad annuity.

Working hours are from 7:00 A. M. to 12:00 Noon; 12:30 P. M. to 3:30 P. M., Monday through Friday, except when holidays fall within the assignment.

(Signed) J. D. MAYS
J. D. Mays
General Diesel Foreman

pc

Copies to: Messrs. W. A. Baker
R. W. McDougall
W. Z. Wells

BV NSB BOW Car and Locomotive Departments

Received: Dec. 26, 1962

FLORIDA EAST COAST RAILWAY COMPANY

St. Augustine, Florida
May 17, 1962

BULLETIN NO. 10

Bids will be received for a period of seven (7) calendar days from date, or until Midnight, May 24, 1962, for one (1) MACHINIST HELPER in the Miller Shop Locomotive Department.

This job created due to Otties Barnes transferring in the service.

Working hours are from 7:00 A. M. to 12:00 Noon; 12:30 P. M. to 3:30 P. M., Monday through Friday, except when holidays fall within the assignment.

(Signed) J. D. MAYS
J. D. Mays
General Diesel Foreman

pc

Copies to: Messrs. W. A. Baker
R. W. McDougall
W. Z. Wells

BV NSB Bow Car and Locomotive Departments

Received May 18, 1962

FLORIDA EAST COAST RAILWAY COMPANY

St. Augustine, Florida
May 9, 1962

BULLETIN NO. 9

Bids will be received for a period of seven (7) calendar days from date, or until Midnight, May 16, 1962, for one (1) MACHINIST HELPER in the Miller Shops Locomotive Department.

This job created due to J. W. Thomas transferring in the service.

Working hours are from 7:00 A. M. to 12:00 Noon; 12:30 P. M. to 3:30 P. M., Monday through Friday, except when holidays fall within the assignment.

(Signed) J. D. MAYS
J. D. Mays
General Diesel Foreman

pc

Copies to: Messrs. W. A. Baker
R. W. McDougall
W. Z. Wells

BV NSB BOW Car and Locomotive Departments

Received May 10, 1962

FLORIDA EAST COAST RAILWAY COMPANY

St. Augustine, Florida
March 29, 1962

BULLETIN NO. 8

Bids will be received for a period of seven (7) calendar days from date, or until Midnight, April 4, 1962, for one (1) MACHINIST in the Miller Shops Locomotive Department.

This job created account V. G. Swindull transferring to position of Wheel Shop Foreman.

Working hours are from 7:00 A. M. to 12:00 Noon; 12:30 P. M. to 3:30 P. M., Monday through Friday, except when holidays fall within the assignment.

(Signed) J. D. MAYS
J. D. Mays
General Diesel Foreman

pc

Copies to: Messrs. W. A. Baker
R. W. McDougall
W. Z. Wells

BV NSB BOW Car and Locomotive Departments

Received March 30, 1962

FLORIDA EAST COAST RAILWAY COMPANY

St. Augustine, Florida
May 24, 1961

BULLETIN NO. 8

Bids will be received for a period of seven (7) calendar days from date, or until Midnight, May 31, 1961, for one (1) ELECTRICIAN HELPER at Miller Shops, effective June 2, 1961. This is a new job.

Working hours are from 7:00 A. M. to 12:00 Noon; 12:30 P. M. to 3:30 P. M., Monday through Friday, except when holidays fall within the assignment.

(Signed) J. D. MAYS
J. D. Mays
General Diesel Foreman

pc

Copies to: Messrs. W. A. Baker
R. A. Hooker
C. A. DuPont

JS LL JES HWR OAM

Received May 25, 1961

FLORIDA EAST COAST RAILWAY COMPANY

St. Augustine, Florida
June 15, 1961

BULLETIN NO. 10

Bids will be received for a period of seven (7) calendar days from date, or until Midnight, June 22, 1961, for one (1) MACHINIST-DIFFERENTIAL at Miller Shops.

This is a temporary vacancy, created due to illness of V. G. Swindull.

Probable duration: Ninety (90) days.

Working hours are from 7:00 A. M. to 12:00 Noon; 12:30 P. M. to 3:30 P. M., Monday through Friday, except when holidays fall within the assignment.

(Signed) J. D. MAYS
J. D. Mays
General Diesel Foreman

pc

Copies to: VP & CMO
Messrs. L. A. Haley
W. Z. Wells

JS LL JES HWR OAM

Received June 16, 1961

FLORIDA EAST COAST RAILWAY COMPANY

St. Augustine, Florida
March 14, 1962

BULLETIN NO. 7

Bids will be received for a period of seven (7) calendar days from date, or until Midnight, March 21, 1962, for one (1) MACHINIST in the Miller Shops Locomotive Department.

This job created account W. H. Smith resigning from the service to make application for railroad annuity.

Working hours are from 7:00 A. M. to 12:00 Noon; 12:30 P. M. to 3:30 P. M., Monday through Friday, except when holidays fall within the assignment.

(Signed) J. D. MAYS
J. D. Mays
General Diesel Foreman

pc

Copies to: Messrs. W. A. Baker
R. W. McDougall
W. Z. Wells

BV NSB BOW Car and Locomotive Departments

Received March 15, 1962

FLORIDA EAST COAST RAILWAY COMPANY

St. Augustine, Florida
March 20, 1962

BULLETIN NO. 42

ALL SUPERVISORS:

Bids will be received for seven calendar days from date for the following position at Miller Shops:

One (1) Wheel Shop Foreman $626.28 per month

Hours of Service: 7:00 A. M. to 12:00 Noon and 12:30 P. M. to 3:30 P. M., daily except Saturdays and Sundays.

This vacancy created account C. T. Shepherd, Wheel Shop Foreman, relinquishing his rights as foreman due to reasons of health.

Effective date: March 29, 1962.

(Signed) J. D. MAYS
J. D. Mays
General Diesel Foreman

pc

Copies to: Chief Mechanical Officer
Mr. C. W. Puckett
Mr. B. F. Gardner

Bowden Loco. and Car Depts.
New Smyrna Beach Loco. and Car Depts.
Buena Vista

Received March 21, 1962

DEFENDANT'S EXHIBIT LL

Filed: Dec. 2, 1964

St. Augustine, Florida
July 16, 1962.

2

Mr. R. M. Cooke, President,
System Federation No. 69,
Railway Employes Department, A.F.L.-C.I.O,
P. O. Box 34,
New Smyrna Beach, Florida.

Dear Sir:

I have your letter of July 7, 1962, captioned "Re: 1961 Wage-Rules Movement, Florida East Coast Railway Company", reading in pertinent part as follows:

> "Since all of the Railroads of the Southeastern Group, except the Florida East Coast Railway Company, have applied the increases in wages provided for in the June 5, 1962 Chicago Agreement, it appears to us that there should be no further need for conferences with Carrier on this item. It now has become a simple matter of compliance, on the part of the Florida East Coast Railway Company, with the provisions of Rule #46 (a) of the Federated Agreement, which reads as follows:
>
> 'Rule 46. Fixing Rates of Pay.
>
> (a) The Railway will, in the future, maintain rates of pay equal to those

generally paid in the Southeastern Territory.'

"Please advise us at your earliest convenience as to the Railway's intentions concerning the application of Rule #46(a), with reference to the wages now being paid in the Southeastern Territory."

A review of the average hourly earnings in the Southeastern Terirtory of employes in outside industry, as well as those on other Railroads, fails to lend any support to your request and, therefore, there is no change to be made in the decision that I rendered you in my letter of September 29, 1961, with respect to your rate increase proposal.

Yours very truly,

Original Signed by
R. W. Wyckoff
Assistant Vice President and
Director of Personnel.

RWW-h

cc: Mr. R. W. McDougall
Mr. T. B. Steadman
Mr. R. L. Lanier
Mr. C. A. DuPont
Mr. J. L. Christian.

bc: Mr. W. L. Thornton (Personal) With copy of Mr. Cooke's letter attached.

FLORIDA EAST COAST RAILWAY
SYSTEM FEDERATION NO. 69

RAILWAY EMPLOYES' DEPARTMENT
AFFILIATED WITH AFL-CIO

Office of Director of Personnel
Fla. East Coast Railway Co.

Executive Board
R. M. Cooke
P. O. Box 34
New Smyrna Beach, Fla.

R. W. McDougall
4631 Post St.
Jacksonville 5, Fla.

R. L. Lanier
1658 Lakewood Road
Jacksonville 7, Fla.

T. B. Steadman
158 Cleveland Park Drive
Spartanburg, S. C.

R. A. Hooker
1468 N. W. 37th St.
Miami, Fla.

J. L. Christian
209 N. 78th St., Apt. 3
Birmingham 6, Ala.

R. M. Cooke
President
P. O. Box 34
New Smyrna Beach, Fla.

R. L. Lanier
Vice-President
1658 Lakewood Road
Jacksonville 7, Fla.

R. W. McDougall
Secretary-Treasurer
4631 Post St.
Jacksonville 5, Fla.

Affiliated Organizations

Brotherhood Railway Carmen of America

International Association of Machinists

Sheet Metal Workers' International Association

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers

International Brotherhood of Electrical Workers

International Brotherhood
of Firemen, Oilers,
Helpers, Roundhouse
and Railway Shop
Laborers

(UNION LABEL)

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

P. O. Box 34
New Smyrna Beach, Florida
July 7, 1962

Re: 1961 Wage-Rules Movement,
Florida East Coast Railway
Company

Mr. R. W. Wyckoff, Director of Personnel
Florida East Coast Railway Company
St. Augustine, Florida

Dear Sir:

With reference to your letter of June 29, 1962, addressed to Mr. W. F. Howard, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, copy of which you furnished to each of the General Chairmen of the Shop Crafts Organizations comprising System Federation No. 69.

Since all of the Railroads of the Southeastern Group, except the Florida East Coast Railway Company, have applied the increases in wages provided for in the June 5, 1962 Chicago Agreement, it appears to us

that there should be no further need for conferences with Carrier on this item. It now has become a simple matter of compliance, on the part of the Florida East Coast Railway Company, with the provisions of Rule #46 (a) of the Federated Agreement, which reads as follows:

"Rule 46. Fixing Rates of Pay.
(a) The Railway will, in the future, maintain rates of pay equal to those generally paid in the Southeastern Territory."

Please advise us at your earliest convenience as to the Railway's intentions concerning the application of Rule No. 46 (a), with reference to the wages now being paid in the Southeastern Territory.

Yours very truly,

(Signed) R. M. COOKE
R. M. Cooke, President
System Federation No. 69

cc:
Mr. R. W. McDougall
Mr. T. B. Steadman
Mr. R. L. Lanier
Mr. C. A. DuPont
Mr. J. L. Christian

Received July 9, 1962

DEFENDANT'S EXHIBIT No. 00

12/2/64

TO SUPPLEMENT PLAINTIFF'S EXHIBIT 4C

NON-OPS
1954

August 21, 1954

AGREEMENTS
applicable to
"NON-OPERATING" EMPLOYEE GROUPS
except Dining Car Employees
represented by
Fifteen Cooperating Railway Labor Organizations
covering

1. THIRD WEEK OF VACATION
and other revisions of vacation agreement

2. PAID HOLIDAYS

3. OTHER RULES CHANGES

4. HEALTH AND WELFARE PLAN PRINCIPLES

---

applicable to
DINING CAR EMPLOYEES
represented by
Hotel & Restaurant Employees and Bartenders
International Union
covering

1. DISCONTINUANCE OF COST-OF-LIVING ESCALATION

2. WAGE INCREASE - 5c PER HOUR

3. THIRD WEEK OF VACATION

4. PAYMENT TO WIDOW IN LIEU OF VACATION

Chicago, Illinois

— — —

AGREEMENT

This agreement made this 21st day of August, 1954, by and between the participating carriers listed in Exhibits A, B and C, attached hereto and made a part hereof and represented by the Eastern, Western and Southeastern Carriers' Conference Committees and the employees of such carriers shown thereon and represented by the Railway Labor Organizations signatory hereto, through the Employes' National Conference Committee, Fifteen Cooperating Railway Labor Organizations.

WITNESSETH:

WHEREAS, on or about May 22, 1953 certain proposals were served on the carriers parties hereto by the organizations parties hereto on behalf of employees represented by such organizations; and,

WHEREAS, within thirty days following May 22, 1953 certain proposals on behalf of certain of the car-

riers parties hereto were served on certain of the employees of said carriers represented by the organizations parties hereto; and,

WHEREAS, a hearing was conducted by a Presidential Emergency Board (No. 106) and said Board on May 15, 1954 filed its report together with its findings and recommendations with the President of the United States:

NOW THEREFORE IT IS AGREED:

EMPLOYEES' PROPOSALS

ARTICLE I - VACATIONS

Section 1. Article 1 of the Vacation Agreement of December 17, 1941 is hereby amended to read as follows:

(a) Effective with the calendar year 1954, an annual vacation of five (5) consecutive work days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than one hundred thirty-three (133) days during the preceding calendar year.

(b) Effective with the calendar year 1954, an annual vacation of ten (10) consecutive work days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than 133 days during the preceding calendar year and who has five or more years of continuous service and who, during such period of continuous service, renders compensated service on not less than 133

days (151 days in 1949 and 160 days in each of such years prior to 1949) and in each of five (5) of such years not necessarily consecutive.

(c) Effective with the calendar year 1954, an annual vacation of fifteen (15) consecutive work days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than 133 days during the preceding calendar year and who has fifteen or more years of continuous service and who, during such period of continuous service renders compensated service on not less than 133 days (151 days in 1949 and 160 days in each of such years prior to 1949) in each of fifteen (15) of such years not necessarily consecutive.

(d) Paragraphs (a), (b) and (c) hereof shall be construed to grant to weekly and monthly rated employees, whose rates contemplate more than five days of service each week, vacations of one, two or three work weeks.

(e) Service rendered under agreements between a carrier and one or more of the Nonoperating Organizations parties to the General Agreement of August 21, 1954 of which this Article is a part, shall be counted in computing days of compensated service and years of continuous service for vacation qualifying purposes under this Agreement.

(f) Calendar days in each current qualifying year on which an employee renders no service because of his own sickness or because of his own injury on the job shall be included in computing days of compensated service and years of continuous service for vaca-

tion qualifying purposes on the basis of a maximum of ten (10) such days for an employee with less than five (5) years of service; a maximum of twenty (20) such days for an employee with five (5) but less than fifteen (15) years of service; and a maximum of thirty (30) such days for an employee with fifteen (15) or more years of service with the employing carrier.

(g) In instances where employees have performed seven (7) months' service with the employing carrier, or have performed, in a calendar year, service sufficient to qualify them for a vacation in the following calendar year, and subsequently become members of the Armed Forces of the United States, the time spent by such employees in the Armed Forces will be credited as qualifying service in determining the length of vacations for which they may qualify upon their return to the service of the employing carrier.

(h) An employee who is laid off and who has no seniority date and no rights to accumulate seniority, who renders compensated service, before layoff, on not less than one hundred thirty-three (133) days in a calendar year and who returns to service, in the following year, for the same carrier, in the same seniority district where he would have accumulated seniority had his rights so permitted, will be granted a vacation in the year of his return after the performance, in such year, of compensated service of not less than sixty (60) days. This paragraph creates no obligation to rehire such employee after his layoff.

Section 2. Article 2 of the Vacation Agreement of December 17, 1941 is hereby amended to read as follows:

2. Subject to the provisions of Section 1 hereof as to qualifications for each year, effective with the calendar year 1954 annual vacations with pay of seven and one-half and ten consecutive work days will be granted to the following employees, after two and three years of continuous service respectively:

(a) The following described employees if represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees:

(1) Clerks (clerical workers and machine operators) which classification for the purposes of this Agreement shall be construed to also include the occupations hereafter named — Agents and assistant agents; traveling auditors, traveling freight claim agents and adjusters, traveling time adjusters or traveling checkers, traveling accountants and traveling car agents; storekeepers, assistant storekeepers and supply car storekeepers, station masters and assistant station masters; supervisors and assistant supervisors; baggage agents and assistant baggage agents; general foremen and assistant general foremen, foremen and assistant foremen; fuel, lumber, tie, loss and damage, store and material, transportation, icing and refrigeration, freight and perishable, scale and material inspectors; car distributors; crew dispatchers; ticket sellers; checkers, talleymen, receivingmen and deliverymen, defined as clerks in existing agreements; stockmen, stockkeepers, countermen, stationers and counter checkmen in stores department; weighmasters; toll collectors; caboose supply checkers; teletype operators.

(2) Other office and station employees which classification shall include the occupations hereafter named by whatever payroll title designated, but no others; Gang foremen other than those paid on differential hourly or tonnage basis; office boys, messengers and chore boys; train announcers; gatemen, train and engine crew callers; telephone switchboard operators; elevator operators; matrons and watchmen in office buildings; operators of office or station equipment devices or appliances such as those for duplicating letters and statements, perforating papers, adjusting dictating machine cylinders, numbering claims and other papers; employees engaged in assorting, checking or filing tickets, waybills, claims, pay and time checks, car movements, per diem or other checks, freight claims, dray tickets, requisitions, tickets or waybills against reports; employees engaged exclusively in gathering and distributing or delivering mail.

(b) Employees represented by The Order of Railroad Telegraphers, except custodians, caretakers, and small non-telegraph agents.

(c) Paragraphs (a) and (b) hereof, shall be construed to grant to weekly and monthly rated employees whose rates contemplate more than five (5) days of service each week, one and one-half or two weeks of vacation.

Section 3. When, during an employee's vacation period, any of the seven recognized holidays (New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas) or any day which by agreement has been substituted or is observed in place of any of the seven

holidays enumerated above, falls on what would be a work day of an employee's regularly assigned work week, such day shall be considered as a work day of the period for which the employee is entitled to vacation.

Section 4. Effective January 1, 1955, Article 5 of the Vacation Agreement of December 17, 1941 is hereby amended by adding the following:

> Such employee shall be paid the time and one-half rate for work performed during his vacation period in addition to his regular vacation pay.
>
> Note: This provision does not supersede provisions of the individual collective agreements that require payment of double time under specified conditions.

Section 5. Article 8 of the Vacation Agreement of December 17, 1941 is hereby amended by adding the following:

> Effective with the year 1954, it is understood that if an employee who performed the necessary qualifying service in the year prior to the year of his death, or in the year of his death, or both, dies before receiving such vacation, or vacations, or payment in lieu thereof, payment of the allowance for such vacation or vacations shall be made to his surviving widow, or in the absence of a surviving widow, on behalf of a dependent minor child or children, if any.

Section 6. Except to the extent that articles of the Vacation Agreement of December 17, 1941 are changed by this Agreement, the said agreement and the interpretations thereof and of the Supplemental Agreement of February 23, 1945, as made by the parties, dated June 10, 1942, July 20, 1942 and July 18, 1945 and by Referee Morse in his award of November 12, 1942, shall remain in full force and effect.

In Sections 1 and 2 of this Agreement certain words and phrases which appear in the Vacation Agreement of December 17, 1941, and in the Supplemental Agreement of February 23, 1945, are used. The said interpretations which defined such words and phrases referred to above as they appear in said Agreements shall apply in construing them as they appear in Sections 1 and 2 hereof.

Section 7. Article 15 of the Vacation Agreement of December 17, 1941 is modified to read as follows:

> This agreement shall be effective as of January 1, 1954 and shall be incorporated in existing agreements as a supplement thereto, and shall be in full force and effect for a period of two (2) years from January 1, 1954, and continue in effect thereafter, subject to not less than seven (7) months' notice in writing (which notice may be served in 1955 or in any subsequent year) by any carrier or organization party hereto, of desire to change this agreement as of the end of the year in which the notice is served. Such notice shall specify the changes desired and the recipient of such notice shall then have a period of thirty (30)

days from the date of the receipt of such notice within which to serve notice specifying changes which it or they desire to make. Thereupon such proposals of the respective parties shall thereafter be negotiated and progressed concurrently to a conclusion.

When such notice is served, the proceedings shall be under the provisions of the Railway Labor Act, Amended.

ARTICLE II - HOLIDAYS

Section 1. Effective May 1, 1954, each regularly assigned hourly and daily rated employee shall receive eight hours' pay at the pro rata hourly rate of the position to which assigned for each of the following enumerated holidays when such holiday falls on a workday of the workweek of the individual employee:

New Year's Day	Labor Day
Washington's Birthday	Thanksgiving Day
Decoration Day	Christmas
Fourth of July	

Note: This rule does not disturb agreements or practices now in effect under which any other day is substituted or observed in place of any of the above-enumerated holidays.

Section 2(a). Monthly rates, the hourly rates of which are predicated upon 169-1/3 hours, shall be adjusted by adding the equivalent of 56 pro rata hours to the annual compensation (the monthly rate multiplied by 12) and this sum shall be divided by 12 in order to

establish a new monthly rate. The hourly factor will thereafter be 174 and overtime rates will be computed accordingly.

Weekly rates that do not include holiday compensation shall receive a corresponding adjustment.

Section 2(b). All other monthly rates of pay shall be adjusted by adding the equivalent of 28 pro rata hours to the annual compensation (the monthly rate multiplied by 12) and this sum shall be divided by 12 in order to establish a new monthly rate. The sum of presently existing hours per annum plus 28 divided by 12 will establish a new hourly factor and overtime rates will be computed accordingly.

Weekly rates not included in Section 2(a) shall receive a corresponding adjustment.

Section 3. An employee shall qualify for the holiday pay provided in Section 1 hereof if compensation paid by the Carrier is credited to the workdays immediately preceding and following such holiday. If the holiday falls on the last day of an employee's workweek, the first workday following his rest days shall be considered the workday immediately following. If the holiday falls on the first workday of his workweek, the last workday of the preceding workweek shall be considered the workday immediately preceding the holiday.

Compensation paid under sick-leave rules or practices will not be considered as compensation for purposes of this rule.

Section 4. Provisions in existing agreements with respect to holidays in excess of the seven holidays referred to in Section 1 hereof, shall continue to be applied without change.

Section 5. Nothing in this rule shall be construed to change existing rules and practices thereunder governing the payment for work performed by an employee on a holiday.

ARTICLE III - HEALTH AND WELFARE BENEFITS

The "Health and Welfare Proposal" will be disposed of in conformity with the terms of the Memorandum dated at Chicago, Illinois, August 21, 1954.

CARRIERS' PROPOSALS

ARTICLE IV — CARRIERS' PROPOSAL NO. 6

Eliminate existing rules, regulations, interpretations or practices, however established, which restrict the right of a Carrier to require furloughed employees to perform extra and relief work

This proposal is disposed of by adoption of the following:

1. The Carrier shall have the right to use furloughed employees to perform extra work, and relief work on regular positions during absence of regular occupants, provided such employees have signified in the manner provided in paragraph 2 hereof their de-

sire to be so used. This provision is not intended to supersede rules or practices which permit employees to place themselves on vacancies on preferred positions in their seniority districts, it being understood, under these circumstances, that the furloughed employee will be used, if the vacancy is filled, on the last position that is to be filled. This does not supersede rules that require the filling of temporary vacancies. It is also understood that management retains the right to use the regular employee, under pertinent rules of the agreement, rather than call a furloughed employee.

2. Furloughed employees desiring to be considered available to perform such extra and relief work will notify the proper officer of the Carrier in writing, with copy to the local chairman, that they will be available and desire to be used for such work. A furloughed employee may withdraw his written notice of willingness to perform such work at any time before being called for such service by giving written notice to that effect to the proper Carrier officer, with copy to the local chairman. If such employee should again desire to be considered available for such service notice to that effect — as outlined hereinabove — must again be given in writing. Furloughed employees who would not at all times be available for such service will not be considered available for extra and relief work under the provisions of this rule. Furloughed employees so used will not be subject to rules of the applicable collective agreements which require advance notice before reduction of force.

3. Furloughed employees who have indicated their desire to participate in such extra and relief work will be called in seniority order for this service. Where

extra lists are maintained under the rules of the applicable agreement such employees will be placed on the extra list in seniority order and used in accordance with the rules of the agreement.

Note 1: In the application of this rule to employees who are represented by the organizations affiliated with the Railway Employees Department, A.F. of L., is shall not apply to extra work.

Note 2: Employees who are on approved leave of absence will not be considered furloughed employees for purposes of this agreement.

Note 3: Furloughed employees shall in no manner be considered to have waived their rights to a regular assignment when opportunity therefor arises.

This rule shall become effective November 1, 1954, except on such Carriers as may elect to preserve existing rules or practices and so notify the authorized employee representative or representatives on or before October 1, 1954.

ARTICLE V — CARRIERS' PROPOSAL NO. 7

Establish a rule or amend existing rules so as to provide time limits for presenting and progressing claims or grievances

This proposal is disposed of by adoption of the following:

The following rule shall become effective January 1, 1955:

1. All claims or grievances arising on or after January 1, 1955 shall be handled as follows:

(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. It not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and in-

cluding the highest officer of the Carrier designated for that purpose.

(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employee and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employee or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 9 months' period herein referred to.

2. With respect to all claims or grievances which arose or arise out of occurrences prior to the effective date of this rule, and which have not been filed by that date, such claims or grievances must be filed in writing within 60 days after the effective date of this rule in the manner provided for in paragraph (a) of Section 1 hereof, and shall be handled in accordance with the requirements of said paragraphs (a), (b) and (c) of Section 1 hereof. With respect to claims or grievances filed prior to the effective date of this rule the claims or grievances must be ruled on or appealed, as the case may be, within 60 days after the effective date of this rule and if not thereafter handled pur-

suant to paragraphs (b) and (c) of Section 1 of this rule the claims and grievances shall be barred or allowed as presented, as the case may be, except that in the case of all claims or grievances on which the highest designated officer of the Carrier has ruled prior to the effective date of this rule, a period of 12 months will be allowed after the effective date of this rule for an appeal to be taken to the appropriate board of adjustment as provided in paragraph (c) of Section 1 hereof before the claim or grievance is barred.

3. A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. With respect to claims and grievances involving an employee held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

4. This rule recognizes the right of representatives of the Organizations, parties hereto, to file and prosecute claims and grievances for and on behalf of the employees they represent.

5. This agreement is not intended to deny the right of the employees to use any other lawful action for the settlement of claims or grievances provided such action is instituted within 9 months of the date of the decision of the highest designated officer of the Carrier.

6. This rule shall not apply to requests for leniency.

ARTICLE VI — CARRIERS' PROPOSAL NO. 11

> ***Establish a rule or amend existing rules to provide that in the event of a strike or emergency affecting the operations or business of the Carrier, no advance notice shall be necessary to abolish positions or make force reductions.***

This proposal is disposed of by adoption of the following:

Rules, agreements or practices, however established, that require more than sixteen hours advance notice before abolishing positions or making force reductions are hereby modified so as not to require more than sixteen hours such advance notice under emergency conditions such as flood, snow storm, hurricane, earthquake, fire or strike, provided the Carrier's operations are suspended in whole or in part and provided further that because of such emergency the work which would be performed by the incumbents of the positions to be abolished or the work which would be performed by the employees involved in the force reductions no longer exists or cannot be performed.

This rule shall become effective November 1, 1954, except on such Carriers as may elect to preserve existing rules or practices and so notify the authorized employee representative or representatives on or before October 1, 1954.

ARTICLE VII — CARRIERS' PROPOSAL NO. 23

Establish a rule or amend existing rules so as to permit the Carriers to require mechanics who are on duty, at points or on shifts where mechanics of all crafts are not on duty, to perform the work contained in the classification of work rules of a craft or class that does not at the time have a mechanic on duty

This proposal is disposed of by adoption of the following:

At points where there is not sufficient work to justify employing a mechanic of each craft the mechanic or mechanics employed at such points will, so far as they are capable of doing so, perform the work of any craft that it may be necessary to have performed.

This rule shall become effective November 1, 1954, except on such Carriers as may elect to preserve existing rules or practices and so notify the authorized employee representative or representatives on or before October 1, 1954.

ARTICLE VIII — CARRIERS' PROPOSAL NO. 24

Establish a rule or amend existing rules to recognize the Carriers' rights to assign clerical duties to telegraph service employees and to assign communication duties to clerical employees

This proposal is disposed of with the understanding that present rules and practices are undisturbed.

ARTICLE IX

This agreement is subject to approval of the Courts with respect to Carrier in the hands of Receivers or Trustees.

ARTICLE X

The dispute involving employees represented by the Hotel and Restaurant Employees and Bartenders International Union is disposed of by a separate agreement dated August 21, 1954.

ARTICLE XI — EFFECT OF THIS AGREEMENT

This agreement is in settlement of the dispute growing out of notice served on the carriers listed in Exhibits A, B and C on or about May 22, 1953 and the notices served by certain of the carriers on certain of the employees represented by the organizations listed in Exhibts A, B and C as hereinbefore referred to, and shall be construed as a separate agreement by and on behalf of each of said carriers and its said employees; until changed or modified in accordance with the provisions of the Railway Labor Act, as amended.

SIGNED AT CHICAGO, ILLINOIS, THIS 21ST DAY OF AUGUST, 1954.

For the participating carriers listed in Exhibit A:

(Signed) J. W. Oram
Chairman

(Signed) FRANK J. SYBIL
Vice Chairman

(Signed) ILLEGIBLE
(Signed) ILLEGIBLE
(Signed) H. E. JONES
(Signed) E. B. PERRY
(Signed) G. C. WHITE

For the participating carriers listed in Exhibit B:

(Signed) D. P. LOOMIS
Chairman

(Signed) J. E. WOOLFE
Vice Chairman

(Signed) E. J. CONNORS
(Signed) T. SHORT
(Signed) ILLEGIBLE

For the participating carriers listed in Exhibit C:

(Signed) FRED A. BURROUGHS
Chairman

(Signed) ILLEGIBLE
Vice Chairman

(Signed) B. B. BRYANT
(Signed) T. K. DAY, JR.

Exhibits A B and C are attached to the general agreement signed at Chicago, Illinois, this date.

Employes' National
Conference Committee,
Fifteen Operation
Railway Labor
Organizations:
(Signed) G. E. LEIGHTY
Chairman

Railway Employes'
Department, A.F. of L.

(Signed) ILLEGIBLE
President
International Association of
Machinists.
(Signed) EARL MELTON
General Vice President

International Brotherhood of
Boilermakers, Iron Ship
Builders, Blacksmiths,
Forgers and Helpers.
(Signed) W. A. CALVIN
International President

(Signed) CHAS. E. GOODLIN
Int. Representative —
(Boilermakers)

Blacksmiths —
Railroad Division
(Signed) GEORGE F. BARNA
Int. Representative —
(Blacksmiths)

Sheet Metal Workers'
International Association.
(Signed) C. D. BRUNS
General Vice President

International Brotherhood of
Electrical Workers
(Signed) J. J. DUFFEY
International Vice President

Brotherhood Railway Carmen
of America.
(Signed) IRVIN BARNEY
General President

(Signed) A. J. BERNHARDT
Asst. General President

International Brotherhood of
Firemen, Oilers, Helpers,
Roundhouse and Railway
Shop Laborers.
(Signed) ANTHONY S. MATZ
President

Brotherhood of Railway and
Steamship Clerks, Freight
Handlers, Express and Station
Employes.
(Signed) J. E. M. HARRISON
Grand President

Brotherhood of Maintenance
of Way Employes.
(Signed) T. C. CARROLL
President

The Order of Railroad
Telegraphers
(Signed) T. E. LEIGHTY
President

Brotherhood of Railroad
Signalmen of America
(Signed) JESSE CLARK
President

National Organization,
Masters, Mates and Pilots of
America.
(Signed) R. W. BAILEY
National Secretary-Treasurer

National Marine Engineers'
Beneficial Association
(Signed) H. L. DAGGETT
National President

International Longshoremen's
Association
(Signed) EUGENE MURPHY
International Representative

Hotel & Restaurant
Employees and Bartenders
International Union.
(Signed) EDWARD MILLER

R.W.S.

General President

INTERVENERS' EXHIBIT No. 1

Filed: Dec. 1, 1964

FLORIDA EAST COAST RAILWAY COMPANY
MECHANICAL DEPARTMENT

New Smyrna Beach, Florida
November 27, 1964

BULLETIN NO. MD-381.

TO CARMEN:

Bids will be accepted for seven (7) calendar days from date for the following job:

FIRST SHIFT: 8:00 A. M. to 4:30 P. M., less 30 minutes meal period.

JOB NO.
NSL-406
Air Brakeman

LOCATION
New Smyrna Beach
Locomotive Shop

REST DAYS
Saturday and
Sunday.

DUTIES
Repair and test locomotive and car air brake equipment.

I. E. Smith,
Shop Superintendent.

Cys: General Supt. Motive Power
Mr. R. M. Cooke, General Chairman
Mr. J. A. Cleland, Local Chairman
Bowden Locomotive and Car
Miller Shops Locomotive
New Smyrna Beach Locomotive and Car
Buena Vista-Hialeah Locomotive and Car

— — —

FLORIDA EAST COAST RAILWAY COMPANY

New Smyrna Beach, Florida
April 13, 1962

BULLETIN NO. 64-A

TO CARMEN

Referring to my Bulletin No. 64 dated April 5th, 1962 advertising the following TEMPORARY JOB, probable duration 90 days account C. E. Capes off sick. Bids have been received and job is awarded as follows:

FIRST SHIFT: 7:00 A. M. to 3:00 P.M.

GROUP #1

JOB NO.
5

LOCATION
Repair Track

REST DAYS
Sat. & Sun.

DUTIES
Car
Repairing

AWARDED
S. A. SHEETS

— — —

BULLETIN NO. 65

Bids will be received for a period of Seven (7) calendar days from date for the following TEMPORARY job working at New Smyrna Beach Car Department account S. A. Sheets transferring to a Temporary job.

FIRST SHIFT - 7:00 AM to 3:00 PM

GROUP NO. 2

JOB NO.	*LOCATION*
25	Repair Track
REST DAYS	*DUTIES*
Mon. & Tues.	Welding

(Signed) H. W. ROTON
H. W. ROTON
GENERAL CAR FOREMAN

Copies: Mr. W. A. Baker
Car & Loco. Depts: Bowden
Loco Depts: Miller Shops NSBeach
Buena Vista Motive Power and Car
Mr. R. M. Cooke - Gen. Chairman
Local Chairman
WPBeach

IV. EXHIBITS EXCLUDED AT HEARINGS OF NOVEMBER 30, DECEMBER 1 AND 2, 1964

DEFENDANT'S EXHIBIT W

THE ORDER OF RAILROAD TELEGRAPHERS
Florida East Coast Railway
System Division No. 87

B. C. Forte, General Chairman
P. O. Box 876
Melbourne, Florida

H. A. Owen, Local Chairman
P. O. Box 311
East Palatka, Florida

E. A. Armistead, Gen. Sec. & Treas.
811 Craig St.
New Smyrna Beach, Florida

Mrs. Eva O. Ezell, Local Chairman
3066 N.W. 29th St.
Miami, Florida

New Smyrna Beach Fla.
Jan. 28, 1964

Mr. K. L. O'Connell
802 Lewis Drive
Daytona Beach Fla.

Dear Mr. O'Connell:

I am returning, herewith, your check in the amount of $8.00 recently proffered for payment of your 1964 ORT dues.

Because of your behavior in continuing to work for the Florida East Coast Railway in any capacity during the strike, we can no longer consider you as a member nor accept your dues.

We have photos of you performing switching duties and it is reported that you also worked as signalman's helper or anything they called on you to do to prevent any of your ex-Brothers from ever working for the Fla East Coast Rwy. again.

Yours truly,

(Signed) E. A. ARMISTEAD
E. A. Armistead
Gen. Secy. and Treas.

cc: G. E. Leighty
President

E. M. Mosier
Grand Sec. and Treas.

O. C. Jones
Vice President

I. E. Hamilton
General Chairman

J. C. Ricard
J. L. Rowell
District Chairmen

DEFENDANT'S EXHIBIT X

THE ORDER OF RAILROAD TELEGRAPHERS
Florida East Coast Railway
System Division No. 87

B. C. Forte, General Chairman
P. O. Box 876
Melbourne, Florida

H. A. Owen, Local Chairman
P. O. Box 311
East Palatka, Florida

E. A. Armistead, Gen. Sec. & Treas.
811 Craig St.
New Smyrna Beach, Florida

Mrs. Eva O. Ezell, Local Chairman
3066 N.W. 29th St.
Miami, Florida

New Smyrna Beach, Fla.
Feb. 8, 1964

Mr. C. C. Dempsey, Jr.,
650 S. W. 2nd. Avenue
Boynton Beach, Fla.

Dear Mr. Dempsey:

I am returning herewith, your check in the amount of $30.00 received for payment of your 1964 dues.

Because of your behavior in returning to work, thereby doing whatever you could to see that your ex-Brothers would not be able to return to work for the Fla East Coast Railway, we are unable to consider you as a member or to accept your dues.

Yours truly,

(Signed) E. A. ARMISTEAD
E. A. Armistead
Gen. Secy. and Treas.

cc:

Mr. G. E. Leighty
President

Mr. E. M. Mosier
Grand Secy. and Treas.

Mr. O. C. Jones
Vice President

Mr. I. E. Hamilton
General Chairman

Mr. J. L. Rowell
Mr. J. C. Ricard
District Chairmen

DEFENDANT'S EXHIBIT Y

404 N.W. 19 Street
Miami 36, Florida
November 12, 1964

J. G. Smith
Local Chairman BRC of A.
Victory Lodge No. 384
6408 N.W. 24th Avenue

Dear Sir,

I am presently employed by the FEC Railway Company as a carman helper and would like to become a union member. Please furnish the necessary application blanks and advise the cost of initiation and monthly dues. My address is:

P. N. Oliver
404 N. W. 19th Street
Miami, 36, Florida

Respectfully yours,

(Signed) P. N. OLIVER

Received: Nov. 18, 1964

October 27, 1964

CERTIFIED MAIL — RETURN RECEIPT REQUESTED

Mr. C. L. Winstead, Chairman
Maintenance of Way Employees
The 218 W. Church Street Bldg.
Room 205
Jacksonville, Florida

Dear Sir:

Please send applications for membership in the Brotherhood of Maintenance of Way Union to the undersigned in care of Mr. J. M. Wolfe, Chief Engineer, Florida East Coast Railroad, St. Augustine, Florida.

Twelve (12) applications will be needed with any information that may be necessary.

Yours very truly,

(Signed) F. H. CONRAD JR.
F. H. Conrad, Foreman, Ex. Gang No. 2

(Signed) A. HAMILTON
A. Hamilton, Ex. Gang No. 2

(Signed) H. L. BRANT
H. L. Brant, Ex. Gang No. 2

(Signed) H. LEONARD
H. Leonard, Ex. Gang No. 2

(Signed) E. BETTS
E. Betts, Ex. Gang No. 2

(Signed) L. W. ELLIS
L. W. Ellise, Ex. Gang No. 2

(Signed) J. HARGRAY
J. Hargray, Ex. Gang No. 2

(Signed) R. DUNBAR JR.
R. Dunbar, Jr., Ex. Gang No. 2

(Signed) J. H. WIMBERLY
J. H. Wimberly, Ex. Gang No. 2

(Signed) OSSIE WHITE
O. White, Jr., Ex. Gang No. 2

(Signed) BILLY L. ALMOND
B. L. Almond, Ex. Gang No. 2

(Signed) J. H. BURTON
J. H. Burton, Jr., Ex Gang No. 2

CC: Mr. J. M. Wolfe
Mr. F. H. Conrad, Jr.

C. T. Brame
857 W. 33 Street
Hialeah, Fla.
Nov. 11, 1964

Mr. J. T. Jaillette
Financial Secretary
I.B.E.W. NO. 888
St. Augustine, Fla.

Dear Sir:

This is a request for a membership form that I will complete and return to you for membership in your local I.B.E.W. No. 888. Upon return of this form please quote initiation fee and monthly dues as a B.A. member.

I am now employed as an electrician for the Florida East Coast Railroad at the Hialeah Yards.

Yours Truly

(Signed) C. T. BRAME
C. T. Brame

CC: Mr. R. W. Wycoff, Personnel Director
F.E.C.R.R. St. Augustine, Fla.

Mr. Wycoff: As information to you, this letter was sent by Registered Mail Registry No. 522538 dated Nov. 12, 1964.

Received: Nov. 14, 1964

Nov. 14, 1964

Mr. J. T. Gillett
Financial Secretary
Local 888, I.B.E.W.
St. Augustine, Fla.

Dear Sir:

I would appreciate your sending me an application for a "B" Membership Card and information concerning same, in order to join your union.

Respectfully yours,
(Signed) A. J. MURPHY
A. J. Murphy

cc: Mr. R. W. Wycoff
Personal Director
F.E.C. R.R.
St. Augustine, Fla.

Received: Nov. 17, 1964

7200 N. W. So. Riv. Dr.
Medley, Florida Lot 207

October 31, 1964

H. L. Smith, Financial Sec.
329 N. E. 163rd St.
Miami, Florida

Dear Sir:

This is my application for membership into the Brotherhood of Railway Carmen of America. I am presently employed by the Florida East Coast Railway in the capacity of carman. Enclosed you will find a bank draft in the amount of nineteen dollars; fifteen of which is for the initiation fee and four for the first month's dues. If this is incorrect, please notify me. Thank you.

Sincerely,

C. B. Stutz

Received Nov. 17, 1964

FLORIDA EAST COAST RAILWAY COMPANY
15801 N.W. 38st. Opa Locka, Fla.

November 14, 1964

H.L. Smith Financial Sec.
329 N.E. 103rd St.

Dear Sir:

This is my application for membership into the Brotherhood of Railway Carmen of America. I am presently employed by the Florida East Coast Railway in the capacity of Carman App. 2nd Class. Enclosed you will find a blank draft in the amount of nineteen dollars, fifteen of which is for the initiation fee and four for the first month's dues. If this is incorrect, please notify me. Thank you.

Sincerely,

(Signed) A. H. HEIL JR.

Received: Nov. 17, 1964

313 St. George Street
St. Augustine, Florida

November 4, 1964

CERTIFIED — RETURN RECEIPT REQUESTED

Mr. T. Q. Brailler, Treasurer
Ponce de Leon Lodge No. 848
Brotherhood of Railway & Steamship Clerks
26 Riberia Street
St. Augustine, Florida

Dear Mr. Brailler:

I understand that it is required under the Union Shop Agreement between the Florida East Coast Railway Company and the Employees thereof represented by the Railway Labor Organizations, namely the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees that I become a member of this organization. Therefore, it will be appreciated if you will furnish me with the necessary application form which is requirred to become a member and all information concerning thereto.

Yours very truly,

(Signed) GERALDINE L. CAPELLA
Geraldine L. Capella

Copy to: Mr. R. W. Wyckoff
Vice President & Director of Personnel
Florida East Coast Railway Company
St. Augustine, Florida

Received: Nov. 5, 1964

FLORIDA EAST COAST RAILWAY COMPANY

J. Turner Butler and William A. Hallowes, Trustees

Office of Freight Agent
300 S. W. First Avenue
P. O. Box 2985

P. R. LEAVITT
Freight Agent

MIAMI 30, FLA.

Please Refer to File No.

November 2, 1964

Mr. Ralph H. Schnarr
Dist. Chm. Brotherhood of Ry. & Steamship Clerks
Freight Handlers Express & Station Employees
3640 N. W. Second Terrace
Miami, Florida, 33142

Dear Mr. Schnarr:

This is to make application for membership to the Brotherhood of Railway & Steamship Clerks, Freight Handlers Express and Station Employees' Union.

Very truly yours,

(Signed) DONALD R. BROWN
Donald Brown, Utility Clerk
No. 4, Office of Freight Agent
P. O. Box 2985
Miami, Florida, 33130

Received: Nov. 5, 1964

14511 Harris Place
Miamia Lakes, Fla.
33012

November 13, 1964

Mr. F. C. Bowman
Fin. Sec., ARSA No. 591
20 Saragossa St.
St. Augustine, Fla.

Sir:

Having bid on a Car Foreman's job at Hialeah and receiving same 11-13-64

I am returning to you my Withdrawal Card that was issued to me by Lodge No. 591, with the understanding that I will be received back in the Lodge as a member. Also please find enclosed money order in the amount of $7.00 for dues for the month of November, 1964.

Yours truly

(Signed) A. VARMETER

cc to R. W. Wyckoff Esq.
Vice President
Director of Personnel

Received: Nov. 16, 1964

Mr. A. H. Miller
Local Chairman BRCA

Dear Sir:

Please regard this letter as my application for membership in the BRCA. I am presently employed for the FEC at the Hialeah Car Shop. I hold the title of carman.

Thank you

Yours Truly

(Signed) W. L. TALLEY

Received: Nov. 16, 1964

Mr. A. H. Miller
Local chairman BRCA

Dear Sir

Please regard this letter as my application for membership in the BRCA. I am presently employed for the FEC and hold the title of carman apprentice 3 class.

Thank You

(Signed) F. R. ROMAYNOLO

Received: Nov. 16, 1964

— — —

Miami, Fla.
Nov. 13, 1964

Mr. J. W. McDaniel Act. Pres, & Gen. Chairman
American Railway Supervisors Association, Inc.
560 N. W. 42 St.
Miami, Fla.

Dear Sir:

This is my application to become a member of the American Railway Supervisors Association. Please furnish the proper forms and amount of money for membership.

Yours Truly

(Signed) C. N. HARRELL,
Car Foreman
Florida East Coast Railway
77 N.W. 38 St. Miami, Fla.

— — —

Nov. 14, 1964

4103 East Ninth Lane
Hialeah, Fla.

J. W. Smoak, Local Chairman
180 N. W. 41 St.
Miami, Fla.

Dear Sir:

Please send me a membership form so I may make application in your local upon return of form.

Please quote the initiation fee and monthly dues. I am a machinist apprentice at F. E. C. Railroad.

Sincerely yours.

Thomas G. Sandridge
(Signed) THOMAS G. SANDRIDGE

jrs

Received: Nov. 16, 1964

FLORIDA EAST COAST RAILWAY COMPANY

Hialeah, Fla., Nov. 14, 1964

Mr. A. H. Miller
Local Chairman
Local 555

Please send me information and an application on proceedures for joining Local lodge 555 B.R.C. of A.

(Signed) RUSSELL E. CAIN
Carman
Hialeah Yards

Received: Nov. 16, 1964

———

FLORIDA EAST COAST RAILWAY COMPANY

Hialeah, Fla., 11-14, 1964

Mr. J. W. McDaniels
Local Chairman

Would you please send me a application & information on forms The Car foreman's union of the Florida Coast R. Ry.

Thank You

(Signed) G. H. HUTNEY
Car Foreman
Hialeah Yards

Received: Nov. 16, 1964

November 13, 1964
Berlin A. Roberts
567 E. 22nd Street Apt. No. 1
Hialeah, Florida

Mr. J. W. Smoak
Local Chairman
180 N.W. 1st Street
Miami, Florida

Dear Sir:

This is a request for a membership form that I will complete and return to you for membership in your local.

Upon return of this form please quote initiation fee and monthly dues as a member.

I am now employed as a machinist for Florida East Coast Railway Hialeah yards.

Sincerely,

(Signed) BERLIN A. ROBERTS
Berlin A. Roberts

Received: Nov. 16, 1964

Rt. 8 Box 530
Jacksonville, Florida

November 10, 1964

Mr. J. S. Kellett
Local Chairman BRC
P. O. Box 5603
Jacksonville, Florida

Dear Sir:

I am now employed as a Yard Clerk for the Florida East Coast Railway Company and wish to make application for membership in the Brotherhood of Railroad Clerks Union.

Yours very truly,

(Signed) CONRAD B. DUPES
Conrad B. Dupes

Registered
Return Receipt Requested

bc: Mr. R. W. Wyckoff

Received: Nov. 10, 1964

Route 8 Box 530
Jacksonville, Florida

November 10, 1964

Mr. J. S. Kellett
Local Chairman BRC
P. O. Box 5603
Jacksonville, Florida

Dear Sir:

I would like to make application for membership in the Brotherhood of Railroad Clerks Union. I am now employed by the Florida East Coast Railway as a Yard Clerk.

Yours very truly,

(Signed) J. B. GASQUE
J. B. Gasque

Registered Mail
Return Receipt Requested.

bc: Mr. R. W. Wyckoff

Received: Nov. 10, 1964

Route 8 Box 530
Jacksonville, Florida

November 10, 1964

Mr. J. S. Kellett
Local Chairman BRC
P. O. Box 5603
Jacksonville, Florida

Dear Sir:

I would like to make application for membership in the Brotherhood of Railroad Clerks Union as I am now employed as a clerk for the Florida East Coast Railway Company.

Yours very truly,

(Signed) JOHN L. RINER
John L. Riner

bc: Mr. R. W. Wyckoff

REGISTERED
RETURN RECEIPT REQUESTED

Received: Nov. 10, 1964

FLORIDA EAST COAST RAILWAY COMPANY

Hialeah Fla., Nov. 13, 1964

R. L. Gonzalez
7325 S.W. 17 Terr
Miami, Florida
Nov. 13, 64

Mr. J. W. Smoak
Local Chairman
180 NS 45 St.
Miami, Florida

Dear Sir;

Please send me a membership form so I may make application in your local. Upon return of said application please quote the initial fee and monthly dues required of me.

Yours kindly

(Signed) R. L. GONZALEZ

cc: R. W. Wycoff
Personal Director
F.E.C. R.R.
St. Augustine, Florida

FLORIDA EAST COAST RAILWAY COMPANY

Hialeah Fla., Nov. 13, 1964

Wayne A. Eeibert
3011 S.W. 35th Ave.
W. Hollywood, Fla.

Mr. J. T. Jarlitte
Financial Sect.
IBEW NO. 888
St. Augustine

Dear Sir:

Please send me a membership form so I may make application in your local. Upon return of this form please quote the iniation fee and monthly dues.

Yours truly

(Signed) W. A. SEIBERT

cc: R. W. Wycoff
Personal Director
F.E.C. R.R.
St. Aug. Fla.

FLORIDA EAST COAST RAILWAY COMPANY

Hialeah Fla., November 13, 1964

David F. Syfrett
10820 N. W. 18 Ave.
Miami, Florida.

Mr. J. T. Jarlitte
Financial Sect.
IBEW. No. 888
St. Augustine

Dear Sir

Please send me a membership form so I may make application in your local. Upon return of this form please quote the iniation fee & monthly dues.

Yours Truly

(Signed) DAVID J. SYFRETT

cc: R. W. Wycoff
Personal Director
F.E.C. R.R.
St. Aug., Fla.

FLORIDA EAST COAST RAILWAY COMPANY
Hialeah, Fla., Nov. 13, 1964

R. Tardix Jr.
4611 S.W. 12th Ct.
Ft. Lauderdale, Fla.

Mr. A. H. Miller
Local Chairman
BRC of A
1870 SW. 24th Terr.
Miami, Fla.

Dear Sir;

Please send me a membership form so I may make application in your local. Upon return of this form please quote the initiation fee and monthly dues.

Yours truly

(Signed) R. TARDIX JR.
Carman

cc: R. W. Wycoff
Personal Director
Florida East Coast Railway
St. Augustine, Fla.

FLORIDA EAST COAST RAILWAY COMPANY

Hialeah, Fla., Nov. 13, 1964

Lige Murray
1860 N.W. 74th St.
Miami, Fla.

Mr. A. H. Miller
Local Chairman
B.R.C. of A.
1870 S.W. 24th Terr.
Miami, Fla.

Dear Sir:

Please send me a membership form so I may make application in your local. Upon return of this form please quote the initiation fee and monthly dues.

Yours truly

(Signed) LIGE MURRAY
Carmen Helper

cc: R. W. Wycoff
Personal Director
Florida East Coast R.R.
St. Augustine, Fla.

FLORIDA EAST COAST RAILWAY COMPANY

Hialeah, Fla., Nov. 13, 1964

A. W. Kidwell
46 East 53rd Terr.
Hialeah, Fla.

Mr. A. H. Miller
Local Chairman
BRC of A
1870 S.W. 24th Terr.
Mia, Fla.

Dear Sir:

Please send me a membership form so I may make application in your local. Upon return of this form please quote the initiation fee and monthly dues.

Yours turly

(Signed) A. W. KIDWELL
Carmen

cc: R. W. Wycoff
Personal Director
Florida East Coast R.R.
St. Augustine, Fla.

FLORIDA EAST COAST RAILWAY COMPANY

Hialeah, Fla., Nov. 13, 1964

M. Mahoney
1155 N.W. 2nd Ave. Apt 13.
Miami, Fla.

Mr. A. H. Miller
Local Chairman
B.R.C. of A.
1870 S.W. 24th Terr.
Mia., Fla.

Dear Sir:

Please send me a membership form so I may make application in your local. Upon return of this form please quote the initiation fee and monthly dues.

Yours Truly

(Signed) M. MAHONEY
Carmen Helper

cc: R. W. Wycoff
Personel Director
Florida East Coast R.R.
St. Augustine, Fla.

ST. AUGUSTINE, FLA.
NOVEMBER 12, 1964

MR. I. E. HAMILTON
GENERAL CHAIRMAN
THE ORDER OF RAILROAD TELEGRAPHERS
625 CANAL STREET
NEW SMYRNA BEACH, FLORIDA

ACCOUNT OF BEING ASSIGNED BY BID TO AGENT-OPERATOR POSITION AT ST. AUGUSTINE AGENCY AS OF THIS DATE — WHICH COMES UNDER THE TELEGRAPHERS AGREEMENT AND MY VACATING AN ACCEPTED POSITION GIVEN ME BY THE RAILWAY APRIL 1, 1963 AND ENDING ON NOVEMBER 12, 1964 TO ACCEPT THE ABOVE MENTIONED POSITION — I WILL THANK YOU TO PLEASE SEND ME THE NECESSARY APPLICATION BLANKS FOR MEMBERSHIP IN THE ORDER OF RAILROAD TELEGRAPHERS. ALSO FURNISH ME WITH THE FEES FOR THIS MEMBERSHIP — MAIL SAME TO THE ADDRESS GIVEN BELAW. THANKS.

(Signed) R. P. SMITH
R. P. SMITH
P. O. BOX 586
HASTINGS, FLORIDA

CC: MR. R. W. WYCKOFF — V.P.&D.P.

Received: Nov. 13, 1964

Ted Lunestad
R.F.D. NO. 1 Box 55
St Augustine, Fla.
November 4, 1964.

Mr. T. Q. Brailler, Secretary
Ponce de Leon Lodge No. 848
Brotherhood Of Railway & Steamship Clerks
26 No. Riberia Street
St. Augustine, Fla.

Dear Sir,

Please accept this as my application for membership to Ponce de Leon Lodge No. 848, Brotherhood of Railway & Steamship Clerks.

Sincerely

(Signed) TED LUNESTAD
Ted Lunestad

cc: Mr.R.W.Wyckoff
Vice President and
Director of Personnel
F.E.C. Railway

Received: Nov. 4, 1964

November 3, 1964

Mr. T. Q. Brailler
Ponce deLeon Lodge No. 848
Brotherhood of Railway & Steamship Clerks
26 N. Riberia Street
St. Augustine, Florida

Dear Sir:

Please send me the necessary forms to make application for membership to the Union (Railway Clerks.)

I am presently employed at the Florida East Coast Railway.

Thank you for your consideration.

Yours very truly,

(Signed) K. E. PAULK
K. E. Paulk

cc: R. W. Wyckoff
FEC Railway

Received: Nov. 4, 1964

CERTIFIED MAIL - RETURN RECEIPT REQUEST-

156 Marine Street
St. Augustine, Florida

October 20, 1964

Mr. T. Q. Brallier
Secretary-Treasurer
Brotherhood of Railway & Steamship Clerks
25 No. Riberia Street
St. Augustine, Florida

Dear Mr. Brallier:

I have heard that there is a requirement under the Union Shop Agreement between the Florida East Coast Railway Company and the Employees thereof represented by various Railway Labor Organizations, that I apply for membership in the Labor Organization of which you are an Official.

Therefore I hereby apply for membership and request that you forward to the above address the required forms etc. along with all available information pertaining thereto.

Sincerely yours

J. O. McAloon

CY - Mr. R. W. Wyckoff
Vice President & Director of Personnel
Florida East Coast Railway Company
St. Augustine, Florida

Received: Nov. 2, 1964

FLORIDA EAST COAST RAILWAY COMPANY

J. Turner Butler and William A. Hallowes, Trustees

Office of Freight Agent
300 S. W. First Avenue
P. O. Box 2985

P. R. Leavitt
Freight Agent

November 2, 1964

Mr. Ralph H. Schnarr
Dist. Chm. Brotherhood of Ry. & Steamship Clerks
Freight Handlers Express & Station Employees
3640 N. W. Second Terrace
Miami, Florida, 33142

Dear Mr. Schnarr:

This is to make application for membership to the Brotherhood of Railway & Steamship Clerks, Freight Handlers Express and Station Employees' Union.

Very truly yours,

(Signed) REBA C. HORNE
Reba C. Horne, PBX Operator
Office of Freight Agent
P. O. Box 2985
Miami, Florida, 33130

Received: Nov. 3, 1964

October 30, 1964
St. Augustine, Fla.

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. W. Z. Wells, Local Chairman
International Ass'n of Machinists
Magnolia Park
St. Augustine, Florida

Dear Mr. Wells:

In accordance with the union rules will you please send me an application for membership as Machinist Apprentice in the International Association of Machinists; Lodge No. 1272.

Yours truly,

(Signed) K. M. NORDAN
K. M. Nordan
57 Sanford Street
St. Augustine, Florida

Cy: R. W. Wyckoff

Received: Oct. 30, 1964

P. O. Box 582
St. Augustine, Florida
October 28, 1964

CERTIFIED — RETURN RECEIPT REQUESTED

Mr. T. Q. Brallier, Treasurer
Ponce de Leon Lodge No. 848
Brotherhood of Railway and Steamship Clerks
26 Riberia Street
St. Augustine, Florida

Dear Mr. Brallier:

It has been brought to my attention that it is required under the Union Shop Agreement between the Florida East Coast Railway Company and the Employees thereof represented by the Railway Labor Organizations, namely the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, that I make application for membership in this organization. It will be appreciated if you will furnish me with the necessary application form (or forms) required therefor, and all pertinant information concerning membership therein.

Sincerely yours,

(Signed) PAUL B. WEIERBACH
Paul B. Weierbach

cc: Mr. R. W. Wyckoff
Vice President & Director of Personnel
Florida East Coast Railway Company
St. Augustine, Florida

Received: Oct. 29, 1964

— — —

FLORIDA EAST COAST RAILWAY COMPANY

Michael Joseph Kissling
P. O. Box 416
Atlantic Beach, Fla.

Mr. T. Q. Brailler, Secretary
Ponce de Leon Lodge No. 848
Brotherhood Of Railway & Steamship Clerks
26 No. Ribera Street
St. Augustine, Florida

Dear Sir,

Please accept this as my application for membership to Ponce de Leon Lodge No. 848, Brotherhood of Railway & Steamship Clerks.

Sincerely,

(Signed) MICHAEL JOSEPH KISSLING
Michael Joseph Kissling

cc: Mr. R. W. Wyckoff
Vice President and
Director of Personell
F.E.C., Railway

October 22, 1964
St. Augustine, Fla.

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. W. Z. Wells, Local Chairman
International Ass'n of Machinists
Magnolia Park
St. Augustine, Fla.

Dear Mr. Wells:

In accordance with the union rules will you please send me an application for membership in the International Association of Machinists, Lodge Number 1272 as Machinists Helper.
Thank You.

Yours truly,

(Signed) JOHN H. HORNSBY SR.
John H. Hornsby, Sr.
R. F. D. NO. 1 Box 267
St. Augustine, Fla.

Cy: R. W. Wyckoff

Received: Oct. 27, 1964

FLORIDA EAST COAST RAILWAY COMPANY

5942 W. Fifth Street
Jacksonville, Florida
October 20, 1964

CERTIFIED — RETURN RECEIPT REQUESTED

Mr. T. Q. Brailer, Treasurer
Ponce de Leon Lodge No. 848
Brotherhood of Railway & Steamship Clerks
26 Riberia Street
St. Augustine, Florida

Dear Mr. Brailler:

I understand that it is required under the Union Shop Agreement between the Florida East Coast Railway Company and the Employees thereof represented by the Railway Labor Organizations, namely the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that I become a member of this organization. Therefore, it will be appreciated if you will furnish me with the necessary application form which is required to become a member and all information concerning thereto.

Sincerely yours,

W. C. Douglas, Jr.

CC: Mr. R. W. Wyckoff
Vice President & Director of Personnel
St. Augustine, Florida

Received: Oct. 23, 1964

23 Mulberry Street
St. Augustine, Florida

October 23, 1964

CERTIFIED MAIL — Return Requested

Mr. T. Q. Brallier, Secretary-Treasurer
Lodge 848
26 North Riberia Street
St. Augustine, Florida

Dear Sir:

Since I now employed by the Florida East Coast Railway Company as a stenographer, I would appreciate receiving an application form for membership in Lodge 848, Brotherhood of Railway and Steamship Clerks, which I will complete and return promptly.

Yours truly,

(Mrs.) Virginia M.
Hasselman

bc: Mr. R. W. Wyckoff, Vice President and
Director of Personnel.

Received: Oct. 24, 1964

Rt. 1 Box 16
St. Augustine, Florida

October 22, 1964

CERTIFIED — RETURN RECEPT REQUESTED

Mr. T. Q. Brailler, Treasurer
Ponce de Leon Lodge No. 848
Brotherhood of Railway & Steamship Clerks
26 Riberia Street
St. Augustine, Florida

Dear Mr. Brailler:

I understand that it is required under the Union Shop Agreement between the Florida East Coast Railway Company and the Employees thereof represented by the Railway Labor Organizations, namely the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees that I become a member of this organization. Therefore, it will be appreciated if you will furnish me with the necessary application form which is required to become a member and all information concerning thereto.

Sincerely yours,

Mrs. Helen Doyle

cc: Mr. R. W. Wyckoff
Vice President & Director of Personnel
Florida East Coast Railway Company
St. Augustine, Florida

Received: Oct. 24, 1964

William D. Lindsey
314 Chaple Rd.
St. Augustine, Fla.

October 23, 1964

Mr. T. Q. Brailler, Secretary
Ponce de Leon Lodge No. 848
Brotherhood Of Railway & Steamship Clerks
26 No. Ribera Street
St. Augustine, Fla.

Dear Sir,

Please accept this as my application for membership to Ponce de Leon Lodge No. 848, Brotherhood of Railway & Steamship Clerks.

Sincerely,

(Signed) WILLIAM D. LINDSEY
William D. Lindsey

cc: Mr. R. W. Wyckoff
Vice President and
Director of Personnel
F.E.C. Railway

Received: Oct. 26, 1964

FLORIDA EAST COAST RAILWAY COMPANY

99 N.E. 148 ST. N.M.B.
OCTOBER 23, 1964

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

MR. W. F. HOWARD
GENERAL CHAIRMAN
BROTHERHOOD OF RAILWAY &
STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND
STATION EMPLOYES
1019 COLOMBO STREET
SOUTH JACKSONVILLE, FLORIDA

DEAR SIR:

THIS IS TO MAKE APPLICATION FOR MEMBERSHIP IN THE BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES.

YOURS TRULY,

(Signed) M. R. KEEFE
M. R. KEEFE
YARD CLERK — HIALEAH YARD

MRK
B/C MR. R. W. WYCKOFF

Received: Oct. 26, 1964

FLORIDA EAST COAST RAILWAY COMPANY

7520 N. E. Miami Court
Miami, Florida
October 23, 1964

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. W. F. Howard
General Chairman
Brotherhood of Railway & Steamship Clerk,
Freight Handlers, Express and Station Employes
1019 Colombo Street
South Jacksonville, Florida

Dear Sir:

This is to make application for membership in the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employes.

Yours truly,

(Signed) RICHARD H. MOIR
R. H. Moir
Yard Clerk — Hialeah Yard

RHM
bc: Mr. R. W. Wyckoff

Received: Oct. 26, 1964

FLORIDA EAST COAST RAILWAY COMPANY

930 LITTLE RIVER DRIVE
MIAMI, FLA.

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

MR. W. F. HOWARD
GENERAL CHAIRMAN
BROTHERHOOD OF RAILWAY & STEAMSHIP
CLERKS, FREIGHT HANDLERS, EXPRESS
AND STATION EMPLOYES
1019 COLOMBO STREET
SOUTH JACKSONVILLE, FLA.

DEAR SIR:

THIS IS TO MAKE APPLICATION FOR MEMBERSHIP IN THE BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES.

YOURS TRULY

(Signed) KENNETH J. MONTOVANI
JR.
KENNETH J. MONTOVANI
JR.
YARD-CLERK HIALEAH,
FLA.

KJM R. W. WYCKOFF

CERTIFIED
NO. 846108
MAIL

Received: Oct. 26, 1964

October 20, 1964

Mr. T. A. Brallier, Secy Treasurer
Brotherhood of Railway & Steamship Clerks, Etc.
24 Ribera St.
St. Augustine, Florida

Dear Sir,

Please accept this letter as my request and application for membership into the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employes.

Thank you,

(Signed) WILLIAM R. ELWOOD
William R. Elwood

P.S. Please address replies to:

William R. Elwood
c/o Florida East Coast Railway Co.
Personnel Dept.
St. Augustine, Florida

20 October 1964
Jacksonville, Florida

Mr. R. Q. Brallier, Secretary
Ponce de Leon Lodge No. 878
Brotherhood of Railway and Steamship Clerks
26 North Ribera Street
St. Augustine, Florida

Dear Sir:

Please except this as my application for joining the Brotherhood of Railway and Steamship Clerk's Union, Lodge No. 878.

Sincerely yours,

(Signed) KING I. THOMAS
King I. Thomas

Copy to:
Mr. R. W. Wyckoff, Vice President and Director of Personnel
Florida East Coast Railway Company
St. Augustine, Florida

Received: Oct. 22, 1964

P. O. Box 1005
St. Augustine, Fla.
October 21, 1964

CERTIFIED MAIL — RETURN RECEIPT REQUESTED

Mr. T. Q. Brallier
26 N. Riberia St.
St. Agustine, Florida

Dear Sir:

Please accept this as my application for membership in the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Sincerely,

Signed by L.D.M.
L. D. Martin

Copy: R. W. W.

Received: Oct. 22, 1964

55 Sanford Street
St. Augustine, Florida

October 21, 1964

CERTIFIED MAIL — RETURN RECEIPT REQUESTED

Mr. T. Q. Braillier
26 N. Riberia St.
St. Augustine, Florida

Dear Sir:

Please accept this as my application for membership in the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Sincerely,

(Signed) GLORIA C. WAGES
Gloria C. Wages

Copy To: R. W. W.

Received: Oct. 22, 1964

FLORIDA EAST COAST RAILWAY COMPANY

Apartment Two
67 Orange Street
St. Augustine, Florida
October 21, 1964

CERTIFIED — RETURN RECEIPT REQUESTED

Mr. T. Q. Brailler, Treasurer
Ponce de Leon Lodge No. 848
Brotherhood of Railway & Steamship Clerks
26 Riberia Street
St. Augustine, Florida

Dear Mr. Brailler:

I understand that it is required under the Union Shop Agreement between the Florida East Coast Railway Company and the Employees thereof represented by the Railway Labor Organizations, namely the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that I become a member of this organization. Therefore, it will be appreciated if you will furnish me with the necessary application form which is required to become a member and all information concerning thereto.

Sincerely yours,

(Signed) GILBERT N. JOHNSON
Gilbert N. Johnson

CC: Mr. R. W. Wyckoff
Vice President and Director of Personnel
St. Augustine, Florida

Received: Oct. 22, 1964

FLORIDA EAST COAST RAILWAY COMPANY

84 1/2 Water Street
St. Augustine, Florida
October 21, 1964

CERTIFIED — RETURN RECEIPT REQUESTED

Mr. T. Q. Brailler, Treasurer
Ponce de Leon Lodge No. 848
Brotherhood of Railway & Steamship Clerks
26 Riberia Street
St. Augustine, Florida

Dear Mr. Brailler:

I understand that it is required under the Union Shop Agreement between the Florida East Coast Railway Company and the Employees thereof represented by the Railway Labor Organizations, namely the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that I become a member of this organization. Therefore, it will be appreciated if you will furnish me with the necessary application form which is required to become a member and all information concerning thereto.

Sincerely yours,

(Signed) ELOISE B. REYES
(Mrs.) Eloise B. Reyes

CC: Mr. R. W. Wyckoff
Vice President & Director of Personnel
St. Augustine, Florida

Received: Oct. 22, 1964

FLORIDA EAST COAST RAILWAY COMPANY

St. Augustine, Florida

October 21, 1964

CERTIFIED — RETURN RECEIPT REQUESTED

Mr. T. Q. Brailler, Treasurer
Ponce de Leon Lodge No. 848
Brotherhood of Railway & Steamship Clerks
26 Riberia Street
St. Augustine, Florida

Dear Mr. Brailler:

I understand that it is required under the Union Shop Agreement between the Florida East Coast Railway Company and the Employees thereof represented by the Railway Labor Organizations, namely the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that I become a member of this organization. Therefore, it will be appreciated if you will furnish me with the necessary application form which is required to become a member and all information concerning thereto.

Sincerely yours,

(Signed) P. S. GUSTAFSON
Paul S. Gustafson

CC: Mr. R. W. Wyckoff
Vice President and Director of Personnel
St. Augustine, Florida

Received: Oct. 22, 1964

42 Charlotte Street
St. Augustine, Fla.

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. T. Q. Brallier, Secretary
Ponce de Leon Lodge No. 848
Brotherhood of Railway and Steamship Clerks
26 N. Riberia Street
St. Augustine, Florida

Dear Mr. Brallier:

Please accept this as my request for an application for membership in the Brotherhood of Railway and Steamship Clerks, Ponce de Leon Lodge No. 848.

Yours truly,

(Signed) F. D. MICKLER
F. D. Mickler

cc: Mr. R. W. Wyckoff
FEC Rwy Co.
St. Augustine, Fla.

Received: Oct. 21, 1964

55 Smith St.,
St. Augustine, Fla.
October 21, 1964

CERTIFIED MAIL — RETURN RECEIPT REQUESTED

Mr. T. Q. Brallier, Secretary
Brotherhood Railway and Steamship Clerks,
Freight Handlers, Express and Station Employes
26 North Riberia Street,
St. Augustine, Florida

Dear Mr. Brallier:

Please furnish me with an application form which I may complete in order to apply for membership with the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

Yours very truly,

(Signed) ACIE BRANT
Acie Brant
General Office Porter

CC—Mr. R. W. Wyckoff
Vice President & Director of Personnel
F. E. C. Railway Company,
St. Augustine, Florida

Received: Oct. 22, 1964

St. Augustine, Florida
October 20, 1964

CERTIFIED MAIL — RETURN RECEIPT REQUESTED

Mr. T. Q. Brallier
26 North Riberia Street
St. Agustine, Florida

Dear Mr. Brallier:

It appears that it may be a requirement that I belong to the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes under a Union Shop Agreement.

Therefore, please furnish me with an application form which I may complete in order to make application for membership.

Yours very truly,

(Signed) MIRIAM W. MASON
Miriam W. Mason (Mrs.)
307 Asturias Street
St. Augustine, Florida

cc - Mr. R. W. Wyckoff
Vice President & Director of Personnel
F. E. C. Railway
St. Augustine, Florida

T. E. Johnston
3102 Rayford St.
Jacksonville, Fla.

October 21, 1964

Mr. T. Q. Brallier, Secretary
Brotherhood of Railway & Steamship Clerks
Lodge No. 848
26 N. Riberia St.
St. Augustine, Fla.

Dear Sir;

Please accept this as my application for membership to Lodge No. 848 Brotherhood of Railway & Steamship Clerks.

Sincerely,

(Signed) T. E. JOHNSTON
T. E. Johnston

CC: MR. R. W. WYCKOFF
Vice President &
Director of Personnel
Fla. East Coast Railway Co.

Received: Oct. 20, 1964

4169 Spring Park Circle
Jacksonville 7, Florida

October 20, 1964

CERTIFIED — RETURN RECEIPT REQUESTED

Mr. T. Q. Brailler, Treasurer
Ponce de Leon Lodge No. 848
Brotherhood of Railway & Steamship Clerks
26 Riberia Street
St. Augustine, Florida

Dear Mr. Brailler:

I understand that it is required under the Union Shop Agreement between the Florida East Coast Railway Company and the Employees thereof represented by the Railway Labor Organizations, namely the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that I become a member of this organization. Therefore, it will be appreciated if you will furnish me with the necessary application form which is required to become a member and all information concerning thereto.

Sincerely yours,

(Signed) JERAL H. SCOFIELD
Jeral H. Scofield

cc: Mr. R. W. Wyckoff
Vice President & Director of Personnel
St. Augustine, Florida

Received: Oct. 21, 1964

15 Nesmith Street
St. Augustine, Florida

October 20, 1964

CERTIFIED — RETURN RECEIPT REQUESTED

Mr. T. Q. Brailler, Treasurer
Ponce de Leon Lodge No. 848
Brotherhood of Railway & Steamship Clerks
26 Riberia St.
St. Augustine, Florida

Dear Mr. Brailler:

I understand that it is required under the Union Shop Agreement between the Florida East Coast Railway Company and the Employees thereof represented by the Railway Labor Organizations, namely the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that I become a member of this organization. Therefore, it will be appreciated if you will furnish me with the necessary application form which is required to become a member and all information concerning thereto.

Sincerely yours,

(Signed) EDWIN W. GRAMLING
Edwin W. Gramling

cc: Mr. R. W. Wyckoff
Vice President & Director of Personnel
St. Augustine, Florida

Received: Oct. 21, 1964

64 Carrera Street
St. Augustine, Florida

October 19, 1964

CERTIFIED — RETURN RECEIPT REQUESTED

Mr. T. Q. Brailler, Treasurer
Ponce de Leon Lodge No. 848
Brotherhood of Railway & Steamship Clerks
26 Riberia Street
St. Augustine, Florida

Dear Mr. Brailler:

I understand that it is required under the Union Shop Agreement between the Florida East Coast Railway Company and the Employees thereof represented by the Railway Labor Organizations, namely the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that I become a member of this organization. Therefore, it will be appreciated if you will furnish me with the necessary application form which is required to become a member and all information concerning thereto.

Sincerely yours,

(Signed) JAMES W. HUDGINS
James W. Hudgins

cc: Mr. R. W. Wyckoff
Vice President & Director of Personnel
St. Augustine, Florida

Received: Oct. 21, 1964

48 GROVE AVE.
ST. AUGUSTINE, FLA.

OCTOBER 19, 1964

CERTIFIED — RETURN RECEIPT REQUESTED

Mr. T. Q. Brailler, Treasurer
Ponce de Leon Lodge No. 848
Brotherhood of Railway & Steamship Clerks
62 Riberia Street
St. Augustine, Florida

Dear Mr. Brailler:

I understand that it is required under the Union Shop Agreement between the Florida East Coast Railway Company and the Employees thereof represented by the Railway Labor Organizations, namely; the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that I become a member of this organization. Therefore, it will be appreciated if you will furnish me with the necessary application form which is required to become a member and all information concerning thereto.

Sincerely yours,

(Signed) DRAYTON T. MANUCY JR.
Drayton T. Manucy Jr.

cc: Mr. R. W. Wyckoff
Vice President & Director of Personnel
St. Augustine, Florida

Received: Oct. 21, 1964

A. D. Wages
55 Sanford St.
St. Augustine, Fla.

October 20, 1964

Mr. T. Q. Brallier, Secretary
Brotherhood of Railway & Steamship Clerks
26 N. Riberia St.
St. Augustine, Fla.

Dear Sir:

Please accept this as my application to Ponce de Leon Lodge No. 848, Brotherhood of Railway & Steamship Clerks.

Sincerely,

(Signed) A. D. WAGES
A. D. Wages

CC: Mr. R. W. Wyckoff
Vice President &
Director of Personnel
Fla. East Coast Railway

Received: Oct. 19, 1964

2232 Leon Road
Jacksonville 16, Florida

October 16, 1964

CERTIFIED — RETURN RECEIPT REQUESTED

Mr. T. Q. Brailler, Treasurer
Ponce de Leon Lodge No. 848
Brotherhood of Railway & Steamship Clerks
26 Riberia Street
St. Augustine, Florida

Dear Mr. Brailler:

I understand that it is required under the Union Shop Agreement between the Florida East Coast Railway Company and the Employees thereof represented by the Railway Labor Organizations, namely the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that I become a member of this organization. Therefore, it will be appreciated if you will furnish me with the necessary application form which is required to become a member and all information concerning thereto.

Sincerely yours,

(Signed) FRANK L. PERKINS
Frank L. Perkins

cc: Mr. R. W. Wyckoff
Vice President & Director of Personnel
St. Augustine, Florida

Received: Oct. 17, 1964

118 Bridge Street
St. Augustine, Florida

October 16, 1964

CERTIFIED — RETURN RECEIPT REQUESTED

Mr. T. Q. Brailler, Treasurer
Ponce de Leon Lodge No. 848
Brotherhood of Railway & Steamship Clerks
62 Riberia Street
St. Augustine, Florida

Dear Mr. Brailler:

I understand that it is required under the Union Shop Agreement between the Florida East Coast Railway Company and the Employees thereof represented by the Railway Labor Organizations, namely; the **Brotherhood of Railway and Steamship Clerks,** Freight Handlers, Express and Station Employees that I become a member of this organization. Therefore, it will be appreciated if you will furnish me with the necessary application form which is required to become a member and all information concerning thereto.

Sincerely yours,

(Signed) JOEL E. O'NEAL
Joel E. O'Neal

cc: Mr. R. W. Wyckoff
Vice President & Director of Personnel
St. Augustine, Florida

Received: Oct. 17, 1964

10 Oak Street
St. Augustine, Florida

October 16, 1964

CERTIFIED — RETURN RECEIPT REQUESTED

Mr. T. Q. Brailler, Treasurer
Ponce de Leon Lodge No. 848
Brotherhood of Railway & Steamship Clerks
26 Riberia Street
St. Augustine, Florida

Dear Mr. Brailler:

I understand that it is required under the Union Shop Agreement between the Florida East Coast Railway Company and the Employees thereof represented by the Railway Labor Organizations, namely; the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that I become a member of this organization. Therefore, it will be appreciated if you will furnish me with the necessary application form which is required to become a member and all information concerning thereto.

Sincerely yours,

(Signed) SUZANN M. HUTTINGER
Suzann M. Huttinger

cc: Mr. R. W. Wyckoff
Vice President & Director of Personnel
St. Augustine, Florida

Received: Oct. 17, 1964

DEFENDANT'S EXHIBIT Z

Letter 11/20/64 to C. A. Dupont from C. T. Brame
11/25/64 to R. H. Schnarr from Donnie E. Clemons
11/25/64 to R. H. Schnarr from James Stallone
11/25/64 to R. H. Howard from Wm. F. Hodges
11/19/64 to Brotherhood of Railway Clerks Lodge from Phillip L. Young
11/25/64 to W. F. Howard from Conrad B. Dupes
11/18/64 to Conrad Dupes from W. F. Howard

— — —

November 25, 1964.

Mr. W. F. Howard — General Chairman
Brotherhood of Railway and Steamship Clerks
Freight Handlers-Express and Station Employes
1019 Colombo Street
Jacksonville 7, Florida

Dear Sir

I have your letter concerning my request for application for membership in the Brotherhood of Railway and Steamship Clerks-Freight Handlers. Express and station employes in which you request a considerable amount of information pertaining to my status with the railway.

I have had occasion to review the constitution of the grand lodge statutes of your organization and I observe that your organization publishes a form for ap-

plications. If you will furnish me with that form I will be glad to complete the information requested thereon and have the application recommended by a member in good standing as required by the constitution.

Your prompt reply will be appreciated.

Yours very truly

(Signed) CONRAD B. DUPES
Conrad B. Dupes

Received: Nov. 26, 1964

— — —

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
Florida East Coast Railway
System Board of Adjustment

General Secretary-Treasurer
Frances K. DuBose
1735 Parkwood Street
Jacksonville, Florida

General Chairman
W. F. Howard
1019 Colombo Street
Jacksonville, Florida

November 18, 1964.
1-0

Mr. Conrad B. Dupes,
Route 8, Box 530,
Jacksonville, Fla.

Dear Sir:

I am in receipt of your inquiry, addressed to District Chairman J. S. Kellett, indicating you may be interested in becoming a member of our Organization.

This letter is the first indication we have had that you are employed in any of the groups which we represent, and to give consideration to your request we need the following information:

1. Your full name.
2. Complete address.
3. Date employed.
4. Where employed.
5. In what capacity employed, title of position or classification.
6. What training have you had in this capacity.
7. Rate of pay of position occupied.
8. Is your employment regular.

Yours very truly,

(Signed) W. F. HOWARD
General Chairman.

WFH:MHH

Nov. 25, 1964

Brotherhood of Rwy. Clerks
FEC System Bd. No. 115
W. F. Howard General Chairman
1019 Colombo Street
Jacksonville 7 Florida

Dear Mr. Howard

Please accept this as my application for membership in the Brotherhood of Railway Clerks. I am presently employed as a yard clerk at Bowden Yards.

William F. Hodges
Route 8 Box 530
Jacksonville Florida

Yours truly

(Signed) WILLIAM F. HODGES
William F. Hodges

Received: Nov. 26, 1964

November 19, 1964
Miami, Florida

The Brotherhood of Railway Clerks — Lodge 3005
1679 NW 16th Terrace

Gentlemen:

Please send me an application for admission into the Brotherhood of Railway Clerks.

Yours Truly

(Signed) PHILLIP L. YOUNG
Phillip L. Young
3740 NW 66th Ave.
Virginia Gardens

Blind Copy: to Mr. R. W. Wyckoff, Vice President and Personnel Director.

Received: Nov. 26, 1964

FLORIDA EAST COAST RAILWAY COMPANY

November 25, 1964

Mr. R. H. Schnarr
Dist. Chairman-Brotherhood of Rwy
Steamship Clerks-Freight Handlers
Express and Station Employees
224 N.W. 91st Street
Miami 42, Fla.

Dear Sir;

I wish an application for membership in the Brotherhood of Rwy Steamship Clerks-Freight Handlers, Express and Station Employees. Would you kindly furnish the necessary application form. Acknowledging my request would be kindly appreciated.

Sincerely Yours,

(Signed) DONNIE E. CLEMONS
Donnie E. Clemons
Utility Clerk
Fla. East Coast Rwy. Co.

Copy: Mr. R. W. Wyckoff
Vice-President & Head of Personnel
St. Augustine, Fla.

Received: Nov. 27, 1964

FLORIDA EAST COAST RAILWAY COMPANY

November 25, 1964

Mr. James Stallone
1801 S. W. 1st Ave.
Ft. Lauderdale Fla

Mr. R. H. Schnarr District Chairman
Brotherhood Ry Steamship Clerks —
Freight Handlers — Express and Station
Employees
224 N.W. 91st Street
Miami 42 Florida

Dear Sir:

I wish to make application for membership in "the Brotherhood of Ry Steamship Clerks — Freight Handlers — Express and Station Employees" therefore will you kindly furnish the necessary application forms for my further handling.

Your attention and prompt handling of this request will be greatly appreciated.

Yours very truly

(Signed) JAMES STALLONE
James Stallone
Utility Clerk — Fla
East Coast Ry

Copy: Mr. R. W. Wyckoff
Vice-Presd & Head of Personnel
Fla East Coast Rwy

Received: Nov. 27, 1964

November 20, 1964

Mr. C. A. Dupont
General Chairman
IBEW No. 888
St. Augustine, Fla.

Dear Sir:

On November 12, 1964 I sent a registered letter to Mr. J. T. Jaillette, whom I thought was still Financial Secretary for Local I.B.E.W. No. 888. I have since been informed that he has retired.

Will you please forward me an application form for membership in your Local No. 888, I.B.E.W.

Yours Truly,

(Signed) C. T. BRAME
C. T. Brame
857 W. 33rd Street
Hialeah, Fla.

C.C.
Mr. R. W. Wycoff
Personnel Director
F.E.C. Railraod
St. Augustine, Fla.

Received: Nov. 22, 1964

DEFENDANT'S EXHIBIT AA

Letter 11/21/64 to Lige Murray from R. M. Cooke
11/21/64 to John C. Steem from I. E. Hamilton
11/11/64 to E. A. Armistead from Wm. H. Woodward
11/21/64 to Wm. H. Woodward from I. E. Hamilton
11/18/64 to J. A. Collison from W. F. Howard
11/21/64 to V. L. Geiger from I. E. Hamilton
11/11/64 to E. A. Armistead from S. D. Adams
11/21/64 to S. D. Adams from I. E. Hamilton
11/21/64 to J. C. Drew from I. E. Hamilton
11/18-19/64 to H. W. Howard from L. C. Ross

— — —

JOINT PROTECTIVE BOARD
FLORIDA EAST COAST RAILWAY
Brotherhood Railway Carmen of America
Affiliated With AFL-CIO

Office of R. M. Cooke, General Chairman
P. O. Box 34 or 1202 Live Oak Street
New Smyrna Beach, Florida

November 21, 1964

Lige Murray
1860 NW 74th Street
Miami, Florida

Dear Sir:

I am in receipt of your inquiry indicating you may be

interested in becoming a member of our organization. Your letter is the first indication we have had that you are employed in any of the groups which we represent and to give consideration to your request we need the following information:

1. Your full name.
2. Complete address.
3. Date employed.
4. Where employed.
5. In what capacity employed, title of position or classification.
6. What training have you had in this capacity.
7. Rate of pay of position occupied.
8. Is your employment regular.

Yours truly,

(Signed) R. M. COOKE
R. M. Cooke,
General Chairman

cc:
Mr. A. J. Bernhardt
Mr. R. G. Smith
Mr. A. H. Miller

Received: Nov. 25, 1964

THE ORDER OF RAILROAD TELEGRAPHERS
Florida East Coast Railway
System Division No. 87

I. E. HAMILTON, General Chairman

725 Canal Street
New Smyrna Beach,
Florida 32069
November 21, 1964

Mr. John C. Steen
P. O. Box 225
Homestead, Florida

Dear Sir:

Your inquiry indicating you may be interested in becoming a member of our Organization has been referred to me. Your letter is the first indication we have had that you are employed in any of the groups we represent and to give consideration to your request we need the following information.

1. Your full name.
2. Complete address.
3. Date employed.
4. Where employed.
5. In what capacity employed, title of position or classification.
6. What training have you had in this capacity.
7. Rate of pay of position occupied.
8. Is your employment regular.

As I have been informed that you are a Canadian citizen I should like to know how long and under what conditions you are in this Country.

Yours truly,

(Signed) I. E. HAMILTON
General Chairman

— — —

629 BALL STREET
NEW SMYRNA BEACH,
FLORIDA
NOVEMBER 11, 1964

MR. E. A. ARMISTEAD, G. S. & T.
THE ORDER O F RAILROAD TELEGRAPHERS
811 CRAIG STREET
NEW SMYRNA BEACH, FLROIDA

DEAR MR. ARMISTEAD,

IT IS MY DESIRE TO BECOME A MEMBER OF THE ORDER OF RAILROAD TELEGRAPHERS.

PLEASE FURNISH ME AN APPLICATION FORM AT THE ABOVE ADDRESS. THANK YOU.

Sincerely yours,

WILLIAM H. WOODARD

THE ORDER OF RAILROAD TELEGRAPHERS
Florida East Coast Railway
System Division No. 87

I. E. HAMILTON,
General Chairman

725 Canal Street
New Smyrna Beach,
Florida 32069

November 21, 1964

Mr. William H. Woodward
629 Ball Street
New Smyrna Beach, Florida

Dear Sir:

Your inquiry indicating you may be interested in becoming a member of our Organization has been referred to me. Your letter is the first indication we have had that you are employed in any of the groups we represent and to give consideration to your request we need the following information.

1. Your full name.
2. Complete address.
3. Date employed.
4. Where employed.
5. In what capacity employed, title of position of classification.
6. What training have you had in this capacity.
7. Rate of pay of position occupied.
8. Is your employment regular.

Yours truly,

(Signed) I. E. HAMILTON
General Chairman

BROTHERHOOD OF RAILWAY
AND STEAMSHIP CLERKS
Freight Handlers, Express and Station Employes
Florida East Coast Railway
System Board of Adjustment

General Secretary-Treasurer
Frances K. DuBose
1735 Parkwood Street
Jacksonville, Florida

General Chairman
W. F. Howard
1019 Colombo Street
Jacksonville, Florida

November 18, 1964

1-0

Mr. J. A. Collison,
P. O. Box 607,
Cocoa, Florida.

Dear Sir:

I am in receipt of your inquiry, addressed to Mrs. Maccie Smith at New Smyrna Beach, indicating you may be interested in becoming a member of our Organization.

This letter is the first indication we have had that you are employed in any of the groups which we represent, and to give consideration to your request we need the following information:

1. Your full name.
2. Complete address.
3. Date employed.
4. Where employed.
5. In what capacity employed, title of position or classification.
6. What training have you had in this capacity.
7. Rate of pay of position occupied.
8. Is your employement regular.

Yours very truly,

(Signed) W. F. HOWARD
General Chairman.

WFH:MHH

———

THE ORDER OF RAILROAD TELEGRAPHERS
Florida East Coast Railway
System Division No. 87

I. E. HAMILTON, General Chairman

725 Canal Street
New Smyrna Beach,
Florida 32069
November 21, 1964

Mr. V. L. Geiger
P. O. Box 607
Cocoa, Florida

Dear Sir:

Your inquiry indicating you may be interested in becoming a member of our Organization has been referred to me. Your letter is the first indication we have had that you are employed in any of the groups we represent and to give consideration to your request we need the following information.

1. Your full name.
2. Complete address.
3. Date employed.
4. Where employed.
5. In what capacity employed, title of position or classification.
6. What training have you had in this capacity.
7. Rate of pay of position occupied.
8. Is your employment regular.

Yours truly,

(Signed) I. E. HAMILTON
General Chairman

430 LENORE AVENUE
TITUSVILLE FLORIDA

NOVEMBER 11, 1964

MR. E. A. ARMISTEAD, G. S. & T.
THE ORDER OF RAILROAD TELEGRAPHERS.
811 CRAIG STREET
NEW SMYRNA BEACH FLORIDA.

DEAR MR. ARMISTEAD,

IT IS MY DESIRE TO BECOME A MEMBER OF THE ORDER OF RAILROAD TELEGRAPHERS.

PLEASE FURNISH ME AN APPLICATION FORM AT THE ABOVE ADDRESS.

THANK YOU.

YOURS VERY TRULY

(Signed) S. D. ADAMS
S. D. Adams

Certified Mail
No. 140639 Titusville, Nov. 12, 1964
Receipt Form 3811

Signed by J. A. Eason—11/13/64

THE ORDER OF RAILROAD TELEGRAPHERS
Florida East Coast Railway

System Division No. 87

I. E. HAMILTON, General Chairman

725 Canal Street
New Smyrna Beach,
Florida 32069
November 21, 1964

Mr. S. D. Adams
430 Lenore Avenue
Titusville, Florida

Dear Sir:

Your inquiry indicating you may be interested in becoming a member of our Organization has been referred to me. Your letter is the first indication we have had that you are employed in any of the groups we represent and to give consideration to your request we need the following information.

1. Your full name.
2. Complete address.
3. Date employed.
4. Where employed.
5. In what capacity employed, title of position or classification.
6. What training have you had in this capacity.
7. Rate of pay of position occupied.
8. Is your employment regular.

Yours truly,

(Signed) I. E. HAMILTON
General Chairman

THE ORDER OF RAILROAD TELEGRAPHERS
Florida East Coast Railway
System Division No. 87

I. E. HAMILTON, General Chairman

725 Canal Street
New Smyrna Beach,
Florida 32069
November 21, 1964

Mr. J. G. Drew
1135 Old Dixie Highway
Apartment 3
Vero Beach, Florida

Dear Sir:

Your inquiry indicating you may be interested in becoming a member of our Organization has been referred to me. Your letter is the first indication we have had that you are employed in any of the groups we represent and to give consideration to your request we need the following information.

1. Your full name.
2. Complete address.
3. Date employed.
4. Where employed.
5. In what capacity employed, title of position or classification.
6. What training have you had in this capacity.
7. Rate of pay of position occupied.
8. Is your employment regular.

Yours truly,

(Signed) I. E. HAMILTON
General Chairman

Miami, Fla.

Nov. 18-19-64

Mr. H. W. Howard

Dear Sir:

I wood like to make an application in your organzation as station poter

Your very truly,

(Signed) L. C. ROSS
Porter Hialeah

Received Nov. 20, 1964

DEFENDANT'S EXHIBIT CC

BROTHERHOOD OF RAILWAY
AND STEAMSHIP CLERKS
Freight Handlers, Express and Station Employes
Florida East Coast Railway
System Board of Adjustment

General Secretary-Treasurer
Frances K. DuBose
1735 Parkwood Street
Jacksonville, Florida

General Chairman
W. F. Howard
1019 Colombo Street
Jacksonville, Florida

November 18, 1964
1-0

Mr. M. R. Keefe,
99 N. E. 148 Street,
North Miami Beach, Fla.

Dear Sir:

I am in receipt of your inquiry indicating you may be interested in becoming a member of our Organization.

This letter is the first indication we have had that you are employed in any of the groups which we represent, and to give consideration to your request we need the following information:

1. Your full name. Maurice Richard Keefe.
2. Complete address. 99 N.E. 148th Street, No. Miami Beach, Fla.
3. Date employed. 10/28/63.
4. Where employed. Hialeah Yard.
5. In what capacity employed, title of position or classificiation. Yard Clerk.
6. What training have you had in this capacity. IBM and general office.
7. Rate of pay of position occupied. $2.4853.
8. Is your employment regular. Yes.

Yours very truly,

(Signed) W. F. HOWARD
General Chairman.

WFH:MHH

RWW

To W. F. Howard
11/19/64

DEFENDANT'S EXHIBIT DD

October 29, 1964
St. Augustine, Fla.

*CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Lloyd G. Taylor, Secy. Treasurer
International Association of Machinists
Flagler Lodge 1272
25 Hildreth Avenue
St. Augustine, Florida 32084

Dear Mr. Taylor:

Inclosed please find the completed membership application to join the International Association of Machinists. Lodge number 1272.

If any more information is required please let me know.

Yours truly,

John H. Hornsby, Sr.
RFD No. 1 Box 267
St. Augustine, Florida

Cy: R. W. Wyckoff

MEMBERSHIP APPLICATION

Name
John H. Hornsby, Sr.
1(Print)

Card No. _____
(To br filled in by Secretary)

Journeyman

Specialist
Production Wkr.
Helper X
Apprentice

City
St. Augustine

State
Florida

Date
Nov. 2, 1964

To the Officers and Members of
Int. Assoc. Mach.,

Lodge No.
1271

GENTLEMEN: I herewith tender my application for membership with initiation fee of $_____ and hereby authorize you to act as my representative for collective bargaining.

Employed by
Florida East Coast Railroad

Shift 1(X) 2( ) 3( )

Class of work
Machinist Helper

I am receiving
$2.400 per hour

I have had 1 years of experience, being proficient at
Machinist Helper

If a former member of the International Association of Machinists, supply following information:

Card No. Lodge No. Location
Last Dues Paid 19

(If applicant has served in the Armed Forces, give the following information)

Enlisted
Inducted
June 4, 1954

Serial No.
34633730

Discharged
Nov. 30, 1962

Place of Birth
Sylvester, Georgia

Date of Birth
June 4, 1937

(Month—Day—Year)

(Signed) JOHN H. HORNSBY,

Address RFD #1 Box 267
St. Augustine, Florida

(Street)

Proposed By (City, Zone) (State or Province)

RECEIPT

Lodge No._____ Date_____

Received of _____

Initiation ( ) Reinstatement ( ) Fee for _____

(Signed) _____

(Financial Secretary)

RECEIPT

Lodge No._____ Date_____

Received of _____

Amount $_____ To apply on (, Reinstatement ( )

(Signed) _____

(Illegible or Organizer)

Form 1

Date_____

We, the undersigned committee, report_____

(Favorable or Unfavorable)

Committee: _____

_____

_____

Amount Paid $_____ Date_____

Balance of Fee Paid $ _____ Date_____

Initiation ( ) Reinstated ( ) Date_____

Check Class of Due Book to be issued:

Journeyman ( ) Production Work ( )

Specialist ( ) ILLEGIBLE

DEFENDANT'S EXHIBIT EE

FLORIDA EAST COAST RAILWAY COMPANY

Miami, Florida
November 16, 1964

Mr. D. S. Cooper, Financial
Secretary-Treasurer
Flamingo Lodge 751
Brotherhood of Railway &
Steamship Clerks
1330 S. W. 59th Avenue
Miami, Florida

Dear Mr. Cooper:

In reply to your letter August 14, 1964 (MRI 751) in which you stated in the last paragraph as follows:

"In accordance with Article 2 Section 4 page 76 Statutes for the Government of Lodges, you may not reapply until a period of three (3) months has elapsed."

Attached hereto you will find my personal check No. 68 in the amount of $15.00 to cover reinstatement fee, as well as application for reinstatement in Flamingo Lodge 751 of Brotherhood of Railway & Steamship Clerks.

Very truly yours,

Anna M. Wright

Miss Anna M. Wright
Post Office Box 2985
Miami, Floria
33101

// CERTIFIED MAIL
RETURN RECEIPT REQUESTED//

BC: Mr. R. W. Wyckoff, VP&DP
Mr. T. C. Maurer, VP&CF&CPTO

Received: Nov. 27, 1964

BROTHERHOOD OF
RAILWAY AND STEAMSHIP CLERKS
Freight Handlers, Express and Station Employes
Florida East Coast Railway
System Board of Adjustment

Flamingo Lodge 781
Financial Secretary & Treas.
D. S. Cooper
1330 S.W. 59 Avenue
Miami, Florida

CERTIFIED MAIL

District Chairman
R. H. Schnarr
2645 N.W. 23 Avenue
Miami, Florida

August 14, 1964
MR1-751

Anna M. Wright
P. O. Box 2985
Miami Florida

Dear Miss Wright:

Please be advised your application for reinstatement in the Brotherhood of Railway Clerks, was presented to the Lodge in session at regular meeting August 13, 1964. Also be advised that said application was voted upon and rejected.

I am returning herein application and your check for reinstatement fee.

In accordance with Article 2 Section 4 Page 76 Statues for the Government of Lodges, you may not reapply until a period of three (3) months has elapsed.

Sincerely

(Signed) DENVER S. COOPER

— — —

FLORIDA EAST COAST RAILWAY COMPANY

July 24, 1964

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. D. S. Cooper, Financial
Secretary-Treasurer
Flamingo Lodge 751
Brotherhood of Railway &
Steamship Clerks
1330 S. W. 59th Avenue
Miami, Florida

Dear Mr. Cooper:

In reply to your letter April 13, 1964 (MRI-751) in which you stated in the last paragraph as follows:

"In accordance with Article 2 Section 4 Page 76 Statutes for the Government of Lodges, you

may not reapply until a period of three (3) months has elapsed."

Attached hereto you will find my personal check No. 43 in the amount of $15.00 to cover reinstatement fee, as well as application for reinstatement in Flamingo Lodge 751 of Brotherhood of Railway & Steamship Clerks.

Very truly yours,

Anna M. Wright

Miss Anna M. Wright
Post Office Box 2985
Miami, Florida
33101
BC: Mr. R. W. Wyckoff, VP&DP

Received: July 25, 1964

BROTHERHOOD OF
RAILWAY AND STEAMSHIP CLERKS
Freight Handlers, Express and Station Employes
FLORIDA EAST COAST RAILWAY
SYSTEM BOARD OF ADJUSTMENT

CERTIFIED MAIL

Flamingo Lodge 751
Financial Secretary & Treas.
D. S. Cooper
1330 S. W. 59 Avenue
Miami, Florida

District Chairman
R. H. Schnarr
2645 N.W. 23 Avenue
Miami, Florida

April 13, 1964
MRI-751

Anna M. Wright
P. O. Box 2985
Miammi Florida

Dear Miss Wright:

Please be advised; your application for reinstatement in the Brotherhood of Railway Clerks, was presented to the Lodge in session at regular meeting April 9, 1964; also please be advised that said application was voted upon and rejected.

I am returning herein application and your check for reinstate fee.

In accordance with Article 2 Section 4 Page 76 Statutes for the Government of Lodges, you may not reapply until a period of three (3) months has elapsed.

Sincerely

(Signed) DENVER S. COOPER

— — —

FLORIDA EAST COAST RAILWAY COMPANY
J. Turner Butler and
William A. Hallowes, Trustees
Freight Traffic Department

300 S. W. 1st Ave., P.O. Box 2985
Miami 32, Florida
Please refer to File No.

F. P. OLDFATHER
Assistant Freight Traffic Manager

R. E. BOLICK
District Freight Agent

W. M. THOMPSON, JR.,
A. J. WESTBROOK,
J. F. PARKER,
Commercial Agent

March 16, 1964

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. D. S. Cooper, Financial
Secretary-Treasurer
Flamingo Lodge 751
Brotherhood of Railway &
Steamship Clerks
1330 S. W. 59th Avenue
Miami, Florida

Dear Mr. Cooper:

With reference your letter March 6th, file MRI-751.

You will find attached hereto my check No. 14 in the amount of $15.00 to cover reinstatement fee, as well as application for reinstatement in Flamingo Lodge 751 of Brotherhood of Railway & Steamship Clerks.

Very truly yours,

(Signed) ANNA M. WRIGHT
Anna M. Wright

Miss Anna M. Wright
Post Office Box 2985
Miami, Florida
33101
BC: Mr. R. W. Wyckoff
Mr. T. C. Maurer

Received: March 17, 1964

BROTHERHOOD OF
RAILWAY AND STEAMSHIP CLERKS
Freight Handlers, Express and Station Employes
FLORIDA EAST COAST RAILWAY
SYSTEM BOARD OF ADJUSTMENT

CERTIFIED MAIL

Flamingo Lodge 751
Financial Secretary & Treas.
D. S. Cooper
1330 S. W. 59 Avenue
Miami, Florida

District Chairman
R. H. Schnarr
2645 N.W. 23 Avenue
Miami, Florida

March 6, 1964
MRI-751

Anna M. Wright
P. O. Box 2985
Miami Florida

Dear Miss Wright:

I am in receipt of your letter of March 3, 1964 which states "I interpret your letter as meaning I will not be taken back into the Organization."

You were referring to my letter of Feb. 18, 1964 in which I returned your check rendered as dues. In this

letter I merely stated I was unable to accept dues from you as you were not currently a member.

As it is apparent from your letter, you wish tore-cation form — Please fill this out and return to me together with reinstatement fee of $15.00 and it will be acted upon at next regular meeting of the Lodge.

Sincerely

(Signed) DENVER S. COOPER

— — —

FLORIDA EAST COAST RAILWAY COMPANY
J. Turner Butler and William A. Hallowes, Trustees
Freight Traffic Department

300 S. W. 1st Ave., P. O. Box 2965
Miami 32, Fla.
Please Refer To File No.

F. P. Oldfather
Assistant Freight Traffic Manager

R. E. Bolick
District Freight Agent

W. M. Thompson, Jr.,
A. J. Westbrook,
A. F. Parker,
Commercial Agent

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. D. S. Cooper, Financial
Secretary-Treasurer
Flamingo Lodge 751
Brotherhood of Railway &
Steamship Clerks
1330 S. W. 59th Avenue
Miami, Florida

Dear Mr. Cooper:

I have your letter of February 18, 1964, file MRI-751, returning my check #7, in the amount of $4.50, tendered for March 1964 dues.

I have stated my position concerning invalidity of the action of your Organization with respect to my membership and I maintain that position. Notwithstanding that position, I interpret your letter as meaning that I will not be taken back into the Organization and I would appreciate your advice in this respect.

Your early reply will be appreciated.

Yours very truly

(Signed) ANNA M. WRIGHT
Anna M. Wright

Miss Anna M. Wright
Post Office Box 2985
Miami, Florida
33101

BC: Mr. R. W. Wyckoff - File 26
Mr. T. C. Maurer

Received: March 5, 1964

BROTHERHOOD OF RAILWAY AND
STEAMSHIP CLERKS

Freight Handlers, Express and Station Employes
Florida East Coast Railway
System Board of Adjustment

Flamingo Lodge 751
Financial Secretary & Treas.
D. S. Cooper
1330 S. W. 59 Avenue
Miami, Florida

File MRI-751
Feb. 18, 1964

District Chairman
R. H. Schnarr
2645 N. W. 23 Avenue
Miami, Florida

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Anna Wright
P. O. Box 2985
Miami, Florida

Dear Miss Wright:

Enclosed find your check #7 in amount of four dollars and 50/100 which you tendered for March 1964 dues.

My records indicate you were expelled from mem-

bership in this organization August 21, 1963.

As you are not currently a member, I can not accept this money as dues.

Sincerely

(Signed) DENVER S. COOPER

— — —

BROTHERHOOD OF RAILWAY AND
STEAMSHIP CLERKS

Freight Handlers, Express and Station Employes
Florida East Coast Railway
System Board of Adjustment

Flamingo Lodge 751
Financial Secretary & Treas.
D. S. Cooper
1330 S. W. 59 Avenue

District Chairman
R. H. Schnarr
1645 N. W. 23 Avenue
Miami, Florida

Sept. 13, 1963
MRI - Wright

Anna M. Wright
P. O. Box 2985
Miami, Florida

Miss Wright:

Enclosed find your check #53 in amount of 4.50 which you tendered for Sept. union dues.

In accordance with section 4 article 10 page 94 of statues for Government of Lodges, you were expelled from membership August 21, 1963.

Please be advised you may apply for readmission six months from date of expulsion.

Sincerely

(Signed) DENVER S. COOPER
F.S.T.

751

— — —

FLORIDA EAST COAST RAILWAY COMPANY
J. Turner Butler and William A. Hallowes, Trustees
Freight Traffic Department

300 S. W. 1st Ave., P. O. Box 2985
Miami 32, Fla.
Please Refer To File No.

F. P. Oldfather
Assistant Freight Traffic Manager

R. E. Bolick
District Freight Agent

W. M. Thompson, Jr.
A. J. Westbrook,
J. F. Parker,
Commercial Agent

August 19, 1963

Mrs. Martiel G. Scanlon, Recording Secretary
Flamingo Lodge 751
c/o Mr. Denver S. Cooper
1330 S. W. 59th Avenue
West Miami, Florida

Dear Mrs. Scanlon:

I have your letter of August 12, 1963, notifying me of charges which were brought against me at the regular meeting of the Lodge on August 8, 1963, those charges being based upon my return to work for the Railway during the period of the strike called by the Clerks' Organization.

Section XII of the Florida Constitution, as amended November 7, 1944, provides that:

> "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; ...."

While I recognize that the Supreme Court of the United States has held that the Railway Labot Act supersedes those portions of any State Laws in conflict therewith, I know of no provisions in the Railway

Labor Act which prohibits me from working for any company, regardless of whether that company is engaged in a work stoppage or not. Therefore, the 'right to work amendment' of the Florida Constitution governs in this particular case and any action which might be brought against me by the Organization to penalize me for returning to work with the Railway will be in violation thereof and, consequently, illegal and invalid.

Yours very truly,

(Signed) ANNA M. WRIGHT
Anna M. Wright

BC: Mr. R. W. Wyckoff - File 26, August 16th
Mr. T. C. Maurer

— — —

BROTHERHOOD OF RAILWAY AND
STEAMSHIP CLERKS

Freight Handlers, Express and Station Employes
Florida East Coast Railway
System Board of Adjustment

Flamingo Lodge 751
Financial Secretary & Treas.
D. S. Cooper
1330 S. W. 59 Avenue
Miami, Fla.

District Chairman
R. H. Schnarr
2645 N. W. 23 Avenue
Miami, Florida

Miami, Florida
August 12, 1963

Miss Ann Wright
Card 590
P. O. Box 2985
Miami, Florida

Miss Wright:

Please be advised that charges were brought against you at regular meeting of this Lodge, August 8, 1963, copy of charges enclosed.

You are instructed to appear before a Special Committee to answer these charges at 8 P. M., Wednesday August 21st., in the South Community Room, Dade Federal Bank, 1400 N. W. 36th Street.

(Signed) MARTIEL G. SCANLON
Martiel G. Scanlon
Recording Secretary
Flamingo Lodge 751

Miami, Florida
August 8, 1963

Mr. R. W. Hayes, President
Flamingo Lodge no. 751
Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express and Station Employes

Dear Sir and Brother:

The System Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, issued a bulletin dated January 16, 1963 and entitled "Strike Call and Instructions Pertaining to Conduct of Strike" time and date of strike, "Acting pursuant to the Constitution and Laws of our organization, a strike of the employes we represent on the Florida East Coast Railway is hereby called to commence on Wednesday, January 23, 1963, at 6 A. M., Eastern Standard Time." This bulletin is signed by Mr. F. W. Howard, General Chairman and approved by Mr. Geo. M. Harrison, Grand President and Mr. J. D. Bearden, Vice Grand President.

Article 2 -Protective Laws-

> "Section 4. Any action taken by the Board of Adjustment in conformity with the foregoing Sections of this article shall be law to all members in the service of the employer involved, and members not complying therewith shall be subject to expulsion."

I, E. W. Pollard, being a member in good standing in Flamingo Lodge no. 751, Charge that Miss Anna

M. Wright, a member of Flamingo Lodge no. 751, violated Article 2, Section 4, of the Protective Laws of our Brotherhood, as set forth and in the stipulated manner as follows:

On or about June 10, 1963, Miss Anna M. Wright did accept and preform work for the strike-bound Florida East Coast Railway and did bid on and was assigned to Position of Stenographer-Clerk in the office of the Assistant Freight Traffic Manager, Miami, Florida, as per bulletin 1963-4, dated June 18, 1963, and signed by F. P. Oldfather, Assistant Freight Traffic Manager.

I make this charge in compliance with Article 10 Section 2, Statutes for the Government of Lodges.

Article 10 -Statutes for The Government Of Lodges-
Charges, Trials and Penalties

"Section 2. No member shall be placed on trial for any offence involving a fine, reprimand, suspension (except for nonpayment of dues), or expulsion except that he be first served with specific written charges, given a reasonable time to prepare his defence and afforded a full and fair hearing. Charges Specifying the offence shall be submitted to the lodge in writing, signed by a member in good standing, and a copy thereof promptly furnished the accused member by the Secretary of the Lodge."

Fraternally yours,

(Signed) E. W. POLLARD
E. W. Pollard
Membership card no. 444

DEFENDANT'S EXHIBIT NN

THE FLORIDA TIMES-UNION, JACKSONVILLE, TUESDAY, JULY 21, 1964

IN RAIL-BLAST TRIAL

DEFENSE RESTS CASE WITHOUT TESTIMONY

MIAMI, July 20 (UPI) — The defense rested without calling any witnesses today after it lost motions for an acquittal in the trial of four railroad workers charged with trying to blow up a Florida East Coast trestle last March 12.

Federal Judge Emett C. Choate recessed the trial and scheduled closing arguments and his instructions to the jury for Tuesday.

Defense attorney Hilton Carr of Fort Pierce argued for acquittal on grounds that the government failed to prove an attempt to wreck any train serving in interstate commerce, and that there was attempted entrapment of the defendants through the use of recorders.

Miami-defense attorney Henry Carr, no relation to the other attorney, argued there was no evidence to show the defendants participated in any activity against the strike-plagued railway.

"I am going to let the jury decide this case. The court shouldn't take the decision away from the jury,"

Judge Choate said in ruling out the motions for acquittal.

The prosecution wound up its case by reading a letter in which one of the defendants said "a strike is like a war."

The defendants — John Katsikos, Hugh Winn, John Wesley Davis and Joseph Lee Vedder — went on trial a week ago on charges of violating the federal train wreck statute.

After fighting down defense objections, government attorneys today read a letter written last December by Katsikos to the National Carmen's Union in an appeal for funds to carry on a strike which stated in January 1963. The Carmen's Union was one of 13 nonoperating unions which struck the FEC and Katsikos was recording secretary of Local 555.

"We are fighting your battle, too," the letter said. "That's why we need funds. A strike is like a war. It is an offensive and we have been on the defensive since we went out. When one declares war he should have his battle planned and be ready for war," the letter said.

V. EXHIBITS ATTACHED TO AFFIDAVITS OF EUGENE C. THOMPSON, DATED APRIL 15, 1964

EXHIBIT 1

FLORIDA EAST COAST RAILWAY COMPANY

CERTIFIED MAIL - Return Receipt Requested
Deliver to Addressee Only

St. Augustine, Florida
July 31, 1963
2

Mr. W. F. Howard, General Chairman
Brotherhood of Railway and Steamship Clerks
Freight Handlers, Express and Station
Employes
1019 Colombo Street
Jacksonville 7, Florida

Mr. J. E. Dubberly, General Chairman
Brotherhood of Railroad Signalmen
P. O. Box 6983
Daytona Beach, Florida

Mr. C. L. Winstead, General Chairman
Brotherhood of Maintenance of Way Employes
218 West Church Street Building
Jacksonville 2, Florida

Mr. C. J. Robbins, General Chairman
American Train Dispatchers Association
Route #1
New Smyrna Beach, Florida

Mr. C. W. Puckett, President & Gen. Chrmn.
The American Railway Supervisors Assn.
4565 N. W. 4th Street
Miami 44, Florida

Mr. R. M. Cooke, General Chairman
Brotherhood Railway Carmen of America
P. O. Box 34
New Smyrna Beach, Florida

Mr. J. E. Miller, General Chairman
Railroad Yardmaster of America
411 N. E. 22nd Street
Miami 37, Florida

Mr. Vernon E. Harrison, Gen. Chairman.
Internation Association of Railway
Employes
417 West 16th Street
Jacksonville 6, Florida

Mr. Claybourne Brecks, Gen. Chairmn.
United Transport Service Employes
(Red Caps)
P. O. Box 6381 - Station B
Miami 36, Florida

Mr. I. E. Hamilton, General Chairman
The Order of Railroad Telegraphers
725 Canal Street
New Smyrna Beach, Florida

Mr. C. A. DuPont, Gen. Chrmn.
Int. Bro. of Electrical Workers
18 Poinciana Avenue
St. Augustine, Florida

Mr. R. L. Lanier, General Chairman
Sheet Metal Workers, Internation Assn.
1658 Lakewood Road
Jacksonville 7, Florida

Mr. T. B. Steadman, Gen. Chrmn.
Int. Bro. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers
158 Cleveland Park Drive
Spartanburg, S. C.

Mr. R. W. McDougall, Gen. Chrmn.
International Association of Mechanists
4631 Post Street
Jacksonville 5, Florida

Mr. Ray Abner, Gen. Chrmn.
International Brotherhood of Firemen and Oilers
1004 Hoffman Building
Louisville 2, Ky.

Mr. H. O. Van Arsdall, Sr., Gen. Chrmn.
Brotherhood of Railroad Trainmen
3030 N. W. 2nd Avenue
Miami 37, Florida

Mr. Albert Florence, Gen. Chrmn.
United Transport Service Employes
(Train Porters)
1445 Prince Street
Jacksonville 9, Florida

Mr. W. S. Seltser, Gen. Chrmn.
Dining Car Employes' Union, Local 351
4306 South Michigan Avenue
Chicago 53, Illinois

Received: Aug. 2, 1963

FLORIDA EAST COAST RAILWAY COMPANY

Gentlemen:

"This will constitute notice, pursuant to the provisions of the Railway Labor Act, of desire to cancel the Union Shop Agreements with your Organizations, effective September 1, 1963.

It is our desire that conference on this proposal be held at the earliest practicable date and I suggest that the initial conference be held at 10:00 A. M., Friday, August 16, 1963, in the meeting room, ground floor, Building "A", General Offices, St. Augustine, Florida. In accordance with the provisions of Section 6 of the Railway Labor Act, please acknowledge receipt of this notice and advise if the proposed time, date and place for holding the initial conference are agreeable to you."

Yours very truly,

(Signed) R. W. WYCKOFF
Assistant Vice President
and Director of Personnel

RWW/jly

EXHIBIT 2

September 9, 1963

Mr. R. W. Wyckoff
Asst. Vice President & Director of Personnel
Florida East Coast Railway Company
St. Augustine, Florida

Dear Mr. Wyckoff:

The Board is in receipt of an application for mediation from the Brotherhood of Railroad Trainmen covering a dispute between that organization and the Florida East Coast Railway Company on the following subject:

> "Carrier's notice of July 31, 1963 to cancel Union Shop Agreement."

Please furnish us promptly with any statement you may care to make on behalf of the company.

Very truly yours,

E. C. Thompson
Executive Secretary

cc-to: Mr. Charles Luna, President
Brotherhood of Railroad Trainmen
Standard Building
Cleveland, Ohio 44113

5-snd

EXHIBIT 3

FLORIDA EAST COAST RAILWAY COMPANY

St. Augustine, Florida,
September 13, 1963.
2

Mr. E. C. Thompson, Executive Secretary,
National Mediation Board,
Washington 25, D. C.

Dear Mr. Thompson:

I have your letter of September 9, 1963, advising that the National Mediation Board is in receipt of application for mediation from the Brotherhood of Railroad Trainmen covering a dispute between that Organization and the Florida East Coast Railway involving the Railway's Notice of July 31, 1963 of desire to cancel Union Shop Agreements effective September 1, 1963, and inviting statement on behalf of the Railway.

Effective at 6:00 A. M., January 23, 1963, Eleven Cooperating Non-Operating Labor Organizations began a work stoppage against the Carrier over a wage dispute, the Organizations not directly involved in the work stoppage honoring the picket lines of the striking Unions. Since that time the Railway has resumed practically normal freight operations, utilizing supervisory personnel and new employes hired since the

strike began, in addition to a few employes who went out as a result of the strike but who subsequently returned to the active service of the Railway. While the employes presently performing service with the Railway apparently have no desire to be represented by the Labor Organization here involved, certain Organizations have utilized the Union Shop Agreements as a means of harassing these employes. For these reasons, Notice was served by the Railway under the provisions of Section 6 of the Railway Labor Act on July 31, 1963 of desire to cancel all Union Shop Agreements effective September 1, 1963, with conference thereon being scheduled for 10:00 A. M., Thursday, August 29, 1963, in the meeting room of the Monson Motor Lodge, 32 Bay Street, St. Augustine. Copy of the Railway's Notice of July 31, 1963 is attached as Carrier's Exhibit "A".

At the conference, Mr. C. L. Winstead, General Chairman of the Brotherhood Maintenance of Way Employes, acted as spokesman for the representatives of the Organizations involved, including the Brotherhood of Railroad Trainmen. Consistent with the Railway's practice, a Court Reporter was present to record the discussion ensuing on the subject Notice. Mr. Winstead, however, objected to his presence and requested that he be removed. It was pointed out to Mr. Winstead by the undersigned, representing the Railway, that the presence of a Court Reporter was not in violation of the spirit or intent of the Railway Labor Act, as he contended, but, instead, enabled the parties to have a record as to what actually transpired at the meeting and, therefore, it was simply a matter of good business to have a Court Reporter present. Mr. Winstead was also referred to

the fact that a number of matters, handled under the Railway Labor Act on this property, have been discussed in conferences in which a Court Reporter was present, involving not only Local Representatives but also Grand Lodge Officers of many of the Organizations on the property. In fact, as recently as July 24, 1963, a Court Reporter was present throughout a conference held on the property involving a matter being progressed under the Railway Labor Act, in which Mr. G. E. Leighty, President of the Order of Railroad Telegraphers and Chairman of the Railway Labor Executives Association, Mr. Michael Fox, President, Railway Employes' Department AFL-CIO, Mr. C. L. Dennis, Grand President, Grand Lodge, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, Mr. H. C. Crotty, President, Brotherhood of Maintenance of Way Employees, and Mr. A. J. Bernhardt, General President of the Brotherhood Railway Carmen of America, participated.

Notwithstanding the Railway's position that the presence of a Court Reporter was not in conflict with the spirit, intent or expressed provisions of the Railway Labor Act, as alleged by Mr. Winstead, all Organizational Representatives present, including that of the Brotherhood of Railroad Trainmen, refused to engage in negotiations on the Railway's Notice with a Court Reporter present, thus terminating conferences on the Notice. As a consequence, on September 9, 1963, following expiration of the ten-day period provided for by Section 6 of the Railway Labor Act without notice of request or profer of the services of the Mediation Board, the Organizations involved were notified by Certified Mail of the cancellation of the Union Shop

Agreements. Copy of that letter is attached as Carrier's Exhibit "B".

Since the Organization involved has refused to enter into collective bargaining on the Railway's Notice of July 31, 1963, as required under the provisions of Section 6 of the Railway Labor Act, using the presence of a Court Reporter as an excuse to evade its responsibilities under that Act, it is the position of the Railway that the Organization is not now in position under the Railway Labor Act to request the mediatory services of the National Mediation Board.

Yours very truly,

(Signed) R. W. WYCKOFF
Assistant Vice President and
Director of Personnel.

RWW-1
Encl.

Received: Sept. 17, 1963

EXHIBIT 4

October 11, 1963
Case No. A-7026

Mr. R. W. Wyckoff, Assistant Vice President
Florida East Coast Railway Company
St. Augustine, Florida

Mr. Charles Luna, President
Brotherhood of Railroad Trainmen
Standard Building
Cleveland, Ohio

Gentlemen:

Reference is made to application for mediation filed by the Brotherhood of Railroad Trainmen on September 4, 1963 in dispute with the Florida East Coast Railway Company on the subject of carrier's notice of July 31, 1963 to cancel Union Shop Agreement.

The file was considered by the Board in executive session on October 8, 1963. There appears to be no question but that the notice was properly filed under Section 6 of the Railway Labor Act. The papers show the Brotherhood requested conferences but, under the conditions for such conferences set by the carrier, the organization's representative declined to participate in discussion of the notice. The Board, however, does not consider this to be a bar to docketing the organization's application for mediation on the question in dispute.

NMB Case No. A-7026 has been assigned to this application and you will be notified when the case is set for mediation.

BY DIRECTION OF THE NATIONAL MEDIATION BOARD.

E. C. Thompson
Executive Secretary

4-etm

EXHIBIT 5

NATIONAL MEDIATION BOARD
APPLICATION FOR MEDIATION SERVICES
(File this Application in Duplicate)
MB-455

TO THE NATIONAL MEDIATION BOARD,
Washington, D. C.

A dispute has arisen between the parties shown below which has not been adjusted between them, and the services of the National Mediation Board under section 5, First, of the Railway Labor Act, are hereby invoked on the specific question set forth below. The approximate number of employees involved are 1200.

THE SPECIFIC QUESTION IN DISPUTE

Carrier's July 31, 1963 Notice for cancellation of Union Shop Agreements, effective September 1, 1963.

(If necessary extend question on additional sheet or attach exhibit)

PARTIES TO DISPUTE

FLORIDA EAST COAST RAILWAY COMPANY and ORGANIZATIONS listed in Appendix No. 1.

WORKING AGREEMENT

If an agreement governing rates of pay, rules, or working conditions is in effect, give name of parties thereto and date thereof. If there is no such agree-

ment, so state Various Schedule Agreements and uniform Union Shop Agreement dated November 5, 1953, effective December 1, 1953.

COMPLIANCE WITH RAILWAY LABOR ACT

1. If this dispute involves change in the above-mentioned agreement, attach copy of the 30-day notice served by party desiring change and insert date of notice here See Appendix No. 2 for Notice.

2. If this dispute involves the negotiation of a new or supplemental agreement, attach copy of request made by party desiring same and insert date of request here _____

3. If there has been a refusal to confer, so state and give reason; otherwise, give date of last conference here: Conference terminated on August 29, 1963 account Carrier insisting all proceedings be recorded verbatim.

Signed at St. Louis, Missouri this 4th day of September, 1963.

Name_____ Name G. E. LEIGHTY
(Signature of applicant) (Signature of applicant)

Title_____ Title Chairman
Seventeen Cooperating Railway Labor Organizations

Name_____ Name_____
(Signature of applicant) (Signature of applicant)
Title,_____ Title_____

APPENDIX NO. 1

PARTIES TO DISPUTE

Florida East Coast Railway
and
Railway Employes' Department, AFL-CIO

Brotherhood of Railway Carmen of America

International Association of Machinists

International Brotherhood of Electrical Workers

Sheet Metal Workers' International Association

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers

International Brotherhood of Firemen, Oilers, Helpers, Roundhouse & Railway Shop Laborers

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employes

Brotherhood of Maintenance of Way Employes

The Order of Railroad Telegraphers

Brotherhood of Railroad Signalmen

American Railway Supervisors Association, Inc.

Railroad Yardmasters of America

International Association of Railway Employes

United Transport Service Employes

Joint Council Dining Car Employes

EXHIBIT 6

September 9, 1963

Mr. R. W. Wyckoff
Asst. Vice President & Director of Personnel
Florida East Coast Railway Company
St. Augustine, Florida

Dear Mr. Wyckoff:

The Board is in receipt of an application for mediation from the Seventeen Cooperating Railway Labor Organizations covering a dispute between that organization and the Florida East Coast Railway Company on the following subject:

"Carrier's July 31, 1963 notice for cancellation of Union Shop Agreements, effective September 1, 1963."

For your information in connection with this application, there is attached, hereto, copy of Mr. Leighty's letter of September 4, 1963 transmitting this application together with copy of Appendix No. 1 which indicates the parties to this dispute.

Please furnish us promptly with any statement you may care to make on behalf of the company.

Very truly yours,

E. C. Thompson
Executive Secretary

-attachment-
cc-to: Mr. G. E. Leighty, Chairman
Seventeen Cooperating Railway Labor Organizations
c/o The Order of Railroad Telegraphers
3860 Lindell Boulevard
St. Louis 8, Missouri
5-sad

EXHIBIT 7

FLORIDA EAST COAST RAILWAY COMPANY

Sep. 17 8:44 A.M. '63
National Mediation Board

St. Augustine, Florida,
September 13, 1963.
2

Mr. E. C. Thompson, Executive Secretary,
National Mediation Board,
Washington 25, D. C.

Dear Mr. Thompson:

I have your letter of September 9, 1963, advising that the National Mediation Board is in receipt of application for mediation from Seventeen Cooperating Railway Labor Organizations covering a dispute between them and the Florida East Coast Railway involving the Railway's Notice of July 31, 1963 of desire to cancel the Union Shop Agreements effective Sep-

tember 1, 1963 and inviting statement on behalf of the Railway.

Effective at 6:00 A. M., January 23, 1963, Eleven Cooperating Non-Operating Labor Organizations began a work stoppage against the Carrier over a wage dispute, the Organizations not directly involved in the work stoppage honoring the picket lines of the striking Unions. Since that time the Railway has resumed practically normal freight operations, utilizing supervisory personnel and new employes hired since the strike began, in addition to a few employes who went out as a result of the strike but who subsequently returned to the active service of the Railway. While the employes presently performing service with the Railway apparently have no desire to be represented by the Labor Organization here involved, certain Organizations have utilized the Union Shop Agreements as a means of harassing these employes. For these reasons, Notice was served by the Railway under the provisions of Section 6 of the Railway Labor Act on July 31, 1963 of desire to cancel the Union Shop Agreements effective September 1, 1963, with conference thereon being scheduled for 10:00 A. M., Thursday, August 29, 1963, in the meeting room of the Monson Motor Lodge, 32 Bay Street, St. Augustine. Copy of the Railway's Notice of July 31, 1963 is attached as carrier's Exhibit "A".

At the conference, Mr. C. L. Winstead, General Chairman of the Brotherhood Maintenance of Way Employes, acted as spokesman for the representatives of the Organizations here involved. Consistent with the Railway's practice, a Court Reporter was present to record the discussion ensuing on the subject

Notice. Mr. Winstead, however, objected to his presence and requested that he be removed. It was pointed out to Mr. Winstead by the undersigned, representing the Railway, that the presence of a Court Reporter was not in violation of the spirit or intent of the Railway Labor Act, as he contended, but, instead, enabled the parties to have a record as to what actually transpired at the meeting and, therefore, it was simply a matter of good business to have a Court Reporter present. Mr. Winstead was also referred to the fact that a number of matters, handled under the Railway Labor Act on this property, have been discussed in conferences in which a Court Reporter was present, involving not only Local Representatives but also Grand Lodge Officers of many of the Organizations involved in the present dispute. In fact, as recently as July 24, 1963, a Court Reporter was present throughout a conference held on the property involving a matter being progressed under the Railway Labor Act, in which Mr. G. E. Leighty, President of the Order of Railroad Telegraphers and Chairman of the Railway Labor Executives Association, Mr. Michael Fox, President, Railway Employes' Department AFL-CIO, Mr. C. L. Dennis, Grand President, Grand Lodge, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and Mr. A. J. Bernhardt, General President of the Brotherhood Railway Carmen of America, participated.

Notwithstanding the Railway's position that the presence of a Court Reporter was not in conflict with the spirit, intent or expressed provisions of the Railway Labor Act, as alleged by Mr. Winstead, all Organizational Representatives present refused to engage in

negotiations on the Railway's Notice with a Court Reporter present and departed, thus terminating conferences on the Notice. As a consequence, on September 9, 1963, following expiration of the ten-day period provided for by Section 6 of the Railway Labor Act without notice of request or profer of the services of the Mediation Board, the Organizations involved were notified by Certified Mail of the cancellation of the Union Shop Agreements. Copy of that letter is attached as Carrier's Exhibit "B".

Since the Organizations involved have refused to enter into collective bargaining on the Railway's Notice of July 31, 1963, as required under the provisions of Section 6 of the Railway Labor Act, using the presence of a Court Reporter as an excuse to evade their responsibilities under that Act, it is the position of the Railway that the Organizations are not now in position under the Railway Labor Act to request the mediatory services of the National Mediation Board.

Yours very truly,

(Signed) R. W. WYCKOFF
Assistant Vice President and
Director of Personnel.

RWW-1
Encl.

EXHIBIT 8

October 11, 1963
Case No. A-7027

Mr. R. W. Wyckoff, Assistant Vice President
Florida East Coast Railway Company
St. Augustine, Florida

Mr. G. E. Leighty, Chairman
17 Cooperating Railway Labor Organizations
c/o The Order of Railroad Telegraphers
3860 Lindell Boulevard
St. Louis 8, Missouri

Gentlemen:

Reference is made to exchange of correspondence concerning application for mediation filed by Mr. Leighty in dispute between your respective carrier and organizations on the subject of carrier's notice of July 31, 1963 for cancellation of Union Shop Agreement effective September 1, 1963. These papers were reviewed by the Board in executive session on October 8, 1963.

As outlined in our letter of October 4, 1963, the Board does not agree with Mr. Wyckoff's position as set forth in his communication of September 13, 1963. The Board's records show that Mr. Leighty's application of September 4, 1963 was made within 10 days following termination of conferences on August 29, 1963, and the carrier was so notified in our letter of September 9, 1963. It is the Board's opinion that the carrier's position that the contracts are no longer in effect cannot be supported under the above record.

The Board has docketed Mr. Leighty's application for mediation as NMB Case No. A-7027 and a mediator will be assigned to handle at a date consistent with the Board's other commitments.

BY DIRECTION OF THE NATIONAL MEDIATION BOARD.

E. C. Thompson
Executive Secretary

4-etm

EXHIBIT 9

FLORIDA EAST COAST RAILWAY COMPANY

St. Augustine, Florida
October 15, 1963
2

Mr. E. C. Thompson, Executive Secretary
National Mediation Board
Washington 25, D. C.

Dear Sir:

I have your letter of October 11, 1963 concerning Case No. A-7027, in which you advise, in pertinent part, as follows:

> "As outlined on our letter of October 4, 1963, **the Board does not agree with Mr. Wyckoff's** position as set forth in his communication of September 13, 1963. The Board's records show

that Mr. Leighty's application of September 4, 1963 was made within 10 days following termination of conferences on August 29, 1963, and the carrier was so notified in our letter of September 9, 1963. It is the Board's opinion that the carrier's position that the contracts are no longer in effect cannot be supported under the above record."

Notwithstanding the Board's decision, I must reiterate that it is the position of the Railway that the Union Shop Agreements between the Railway and the seventeen Cooperating Labor Organizations involved in this dispute have been canceled in accordance with the Railway's notices of July 31, 1963 and provisions of Section 6 of the Railway Labor Act. Should the Organizations be desirous of placing in effect new union shop agreements, such result can be obtained only by serving new notices and negotiating them or in the manner prescribed by said Section 6 of the Railway Labor Act.

Yours very truly,

(Signed) R. W. WYCKOFF
Assistant Vice President and
Director of Personnel

RWW/p

EXHIBIT 10

WESTERN UNION TELEGRAM

Oct. 25 8:27 A. M. '63
National Mediation
Board

EDA003 821A EDT OCT 25 63 NHC009 SPOCO74 SA108
S LLU327 PD ST LOUIS MO 24 413P CDT
E C THOMPSON, EXECUTIVE SECY NATIONAL MEDIATION BOARD, NATIONAL RIFLE ASSN. BLDG

1230 16 ST NORTHWEST WASHDC

THE NON-OPERATING ORGANIZATIONS FILED APPLICATION ON WEDNESDAY 23RD FOR MEDIATORY SERVICES OF YOUR BOARD IN DISPUTE WITH FLORIDA EAST COAST RAILWAY INVOLVING CARRIER'S SECTION 6 NOTICES DATED SEPTEMBER 24TH TO SUPERSEDE EXISTING AGREEMENTS. CONFERENCES TERMINATED OCTOBER 18th. PLEASE NOTIFY CARRIER VIA WESTERN UNION MEDIATION HAS BEEN INVOKED

G E LEIGHTY CHAIRMAN CRLO
(20).

EXHIBIT 11

F-MD DL PD NMB 10/25/63 9:30am

R. W. WYCKOFF, ASST. VP, FLORIDA EAST COAST RAILWAY CO. ST. AUGUSTINE, FLA.

FOLLOWING WIRE RECEIVED FROM CHAIRMAN LEIGHTY "THE NON-OPERATING ORGANIZATIONS FILED APPLICATION ON WEDNESDAY 23RD FOR MEDIATORY SERVICES OF YOUR BOARD IN DISPUTE WITH FLORIDA EAST COAST RAILWAY INVOLVING CARRIER'S SECTION 6 NOTICES DATED SEPTEMBER 24TH TO SUPERSEDE EXISTING AGREEMENTS. CONFERENCES TERMINATED OCTOBER 18TH. PLEASE NOTIFY CARRIER VIA WU MEDIATION HAS BEEN INVOKED." YOUR ATTENTION IS CALLED TO PROVISIONS OF SECTION 6 RAILWAY LABOR ACT AND PROMPT STATEMENT REQUESTED.

E C THOMPSON EXEC SECY NMB

4-ctm

EXHIBIT 12

THE ORDER OF RAILROAD TELEGRAPHERS

3860 Lindell Boulevard
St. Louis, Mo.

G. E. Leighty
President

Telephone
Jefferson 3-8321

October 23, 1963

Mr. E. C. Thompson, Executive Secretary
National Mediation Board
Washington, D. C. 20572

MB-456
Proposed Cancellation Seventeen
Collective Bargaining Agreements
Florida East Coast Railway

Dear Sir:

Enclosed herewith please find your NMB Form 2 and attached thereto our Appendix "A", representing the joint application of Seventeen Cooperating Railway Labor Organizations under Section 5, First of the Railway Labor Act, for the services of your Board in attempting to mediate a dispute between these Organizations and the Florida East Coast Railway.

This dispute involves a formal notice served on the Organizations listed on page 2 of the Carrier's formal notice which was served on them September 24, 1963 and concerns the desire of the Florida East Coast Railway to supersede the seventeen separate collective bargaining agreements covering wages and working conditions of the seventeen crafts with a uniform agreement which it proposes to have become effective October 25, 1963, a copy of which is attached as Appendix "A".

The Carrier proposed initial conference with all the Organizations on October 18, 1963, which was accepted by them as a date and time for conference. When the conference opened, however, it was discovered that the Carrier had brought into the conference a reporter and intended to record on a transcript all conversation that ensued. The Organizations objected to the presence of the reporter and to the recording of the conference which is contrary to all customary procedures under the Railway Labor Act in conferences between employers and employees and is not a requirement of that Act. When the Carrier insisted that if there was to be a conference the proceedings must be taken in transcript, the Organizations declined to proceed and the conference was thereupon terminated.

So far as I can recall the type of notice served here by this Carrier is unprecedented in the Railroad Industry; consequently, it is our desire that the application be docketed at once by the Board and mediation

proceedings be instituted at your early convenience. Will you please advise.

Yours respectfully,

(Signed) G. E. LEIGHTY
Chairman
Cooperating Railway Labor
Organizations

Enclosures (2)

Mr. E. C. Thompson October 23, 1963

cc: Messrs. G. M. Harrison
C. L. Dennis
G. E. Leighty
H. C. Crotty
Jesse Clark
A. L. Hayes
R. K. Berg
E. H. Wolfe
E. F. Carlough
Gordon Freeman
A. J. Bernhardt
Anthony Matz
R. C. Coutts
J. P. Tahney
M. G. Schoch
E. F. Frazier
E. S. Miller
J. W. Whitaker
Michael Fox
Howard Pickett

J. W. Ramsey
Erick Erickson
H. Buoy
J. W. O'Brien
T. V. Ramsey
J. B. Zink
R. W. Smith
L. P. Schoene
E. L. Oliver
Donald S. Beattie
O. C. Jones
I. E. Hamilton
J. H. Hadley

For Your Information:
Messrs. R. E. Davidson
H. E. Gilbert
Louis Wagner
Charles Luna
N. P. Spiers

Received: Oct. 28, 1963

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THE
UNIFORM WORKING AGREEMENT
Between
FLORIDA EAST COAST RAILWAY COMPANY
And
EMPLOYEES

Represented By

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Brotherhood of Railroad Signalmen

Order of Railroad Telegraphers
System Federation No. 69 of the Railway Employes' Department, AFL-CIO
International Association of Machinists
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
Sheet Metal Workers International Association
International Brotherhood of Electrical Workers
Brotherhood Railway Carmen of America
International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers
American Railway Supervisors Association
Brotherhood of Maintenance of Way Employes
Railroad Yardmasters of America
American Train Dispatchers Association
International Association of Railway Employes
United Transport Service Employes
Dining Car Employes Union

PREAMBLE

Except to the extent specifically restricted or limited by this Agreement the following rights of Management are possessed and shall be exercised exclusively and solely by the Florida East Coast Railway Company:

> It shall be the sole right and prerogative of the Management to hire, lay off, promote, demote, transfer, suspend or discharge for cause, maintain discipline, establish, change and require observance of Company Rules and regulations, and maintain efficiency of the employees. In addition, the Management has the exclusive duty and right to manage

its business, to classify and direct the working force, to assign and reassign duties to jobs, determine procedural methods and equipment to be utilized, schedule the work week and work, determine the competence of employees and the number of employees to be assigned to a crew, job, task, station or post of duty and the number to be employed or retained in employment and to fix the starting times of jobs. There shall be no obligation on the part of the Management to continue any job and the Management may consolidate or reorganize or discontinue jobs or departments, and set up new departments; and create new job classifications and/or seniority sub-classifications. The foregoing enumeration of Management's rights shall not be deemed to exclude other functions not specifically set forth, the Management therefore, retaining all rights to plan, direct and control operation of its business not otherwise specifically covered by this Agreement. A Management decision not in violation of this Agreement, on any right of Management or on any matter stated in the contract to be in its judgment, shall not be the basis for grievance or claim.

ARTICLE I

SCOPE.

1. These rules shall govern rates of pay, rules and working conditions of employees assigned by the Carrier to job classifications listed in paragraph 4.

(The key number appearing in the column opposite each job classification identifies the representing labor organization.)

2. Employees covered by this Agreement shall perform any work assigned them by the Carrier, including work not normally performed by them in the job classifications to which the Carrier has assigned them. Assignment of an employee to work not normally performed by him in the job classification to which the Carrier has assigned him shall not be a grievance processable under these rules, and shall not constitute a dispute involving interpretation or application of these rules subject to redress in any forum, or by any means apart from processing grievances under these rules.

3. Nothing in these rules shall limit, nor be construed to restrict or suppress, the right of the Carrier to contract work (including work normally performed by employees assigned by the Carrier to job classifications listed in, or added to, paragraph 4) to independent contractors of the Carrier's sole selection.

4. Job classifications and rates of positions covered by this Agreement are: (These job classifications may be eliminated, consolidated or added to by the Railway as the requirements of the service demand).

JOB CLASSIFICATION

JOB TITLE	*STRAIGHT TIME RATE PER HOUR*	*REPRESENTATING ORGANIZATION — (See Appendix "A" for key)*
Enginehouse Foremen	$3.90	15
Car Foremen	3.80	15
Machine Shop Foremen	3.80	15
Electrical Foremen	3.80	15
Dispatchers	3.65	4
Yardmasters	3.65	5
Maintenance of Equip. Gang	3.25	15
Signal Foremen	2.95	8
Bookkeepers	2.95	2
Machine Programmers	2.95	2
Accountants	2.90	2
Welder	2.80	7 or 13
Rate & Division Clerk	2.80	2
Freight Accountant	2.80	2
Signalmen	2.75	8
Machine Operator (IBM)	2.75	2
Rate & Adjustment Clerk	2.75	2
Voucher Clerk	2.75	2

Equipment Repairmen	2.70	17
Machinist	2.70	9
Carmen	2.70	13
Sheet Metal Worker	2.70	11
Electrician	2.70	12
Boiler Maker	2.70	10
Blacksmith	2.70	10
Division Clerk	2.70	2
Requisition Clerk	2.70	2
Specialized B & B Foremen	2.65	7
Specialized Roadway Foremen	2.65	7
Claim Clerk	2.65	2
AAR Clerk	2.65	2
Maintenance Foremen	2.60	7
Signalman Helper	2.60	8
Apprentice First Class	2.60	17
Account Clerk	2.60	2
Cashier-Teller	2.60	2
O. S. & D. Clerk	2.60	2
Crew Caller	2.60	2
Purchasing Clerk	2.60	2
Quotation Clerk	2.60	2
Ticket Refund Clerk	2.60	2
Agent Operator Class I	2.60	3
B & B Gang Foremen	2.55	7
Roadway Gang Foremen	2.55	7
Agent Operator, Class I	2.55	3
Jr. Quotation Clerk	2.55	2
Jr. Claim Clerk	2.55	2
Stenographer	2.55	2

Machine Operator, Heavy	2.50	7
Agents	2.50	3
Warehouse Foremen	2.50	2
Ticket Clerk Operator	2.50	3
Bridgemen	2.45	7
Carpenters	2.45	7
General Clerks	2.45	2
Operators	2.45	3
Reservation Clerks	2.45	2
Yard Clerks	2.45	2
Apprentice Second Class	2.45	17
Machine Operator Light	2.40	7
Bridge Tender, Class I	2.40	7
Welder Helpers	2.40	7 or 13
Ticket Clerks	2.40	2
Clerk	2.40	2
M/E Shop Helpers	2.40	7
M/E Helpers	2.40	1
Baggage Clerks	2.35	2
Apprentice Third Class	2.35	17
Equipment Repairman Helper	2.35	17
Apprentice	2.35	7, 8 or 17
Key Punch Operator	2.35	2
Ticket Stock Clerks	2.30	2
Utility Clerks	2.30	2
Apprentice, Fourth Class	2.25	17
Bridgemen Helpers	2.20	7
Carpenter Helpers	2.20	7
Bridge Tender, Class II	2.20	7

Freight Checkers	2.15	2
Laborers	2.10	2, 7 or 14
Switchboard Operators	2.10	2
Messengers	2.10	2
Station Porters	2.10	2
Red Caps	2.10	6
Crossing Watchman	2.10	7
Cooks	2.10	7
Train Porters	2.00	6
Train Attendants	2.00	16
Train Maids	2.00	16

EXCEPTIONS: The Railway may, at its discretion, designate positions in any craft as "Excepted", following which those positions will no longer be subject to the rules of this Agreement.

ARTICLE II

SENIORITY

(a) Seniority date for new employees will be established as of the date of entering the service. The date of "entering the service" will be the date on which an employee qualifies for service.

Existing seniority rosters will be detailed to create the following master seniority groups:

I - MAINTENANCE OF WAY EMPLOYEES.
II - MAINTENANCE OF EQUIPMENT EMPLOYEES.
III - OFFICE AND CLERICAL EMPLOYEES.
IV - STATION AND MISCELLANEOUS EMPLOYEES.

Each employee will hold seniority in one master seniority group. *(See exception). Classifications of each master seniority group will be made in accordance with job classifications. Employees will be placed on sub-classification seniority lists in accordance with their individual qualifications at such time as they demonstrate those qualifications and are approved by the supervisory officer in charge. To qualify for a sub-classification seniority list, an employee must acquaint himself with the work and demonstrate his qualifications to the supervisory officer in charge without expense to the Railway. The Railway will give those desiring to qualify for another sub-classification seniority list an opportunity to learn the work and requirements of such group.

(b) A seniority date on sub-classification seniority lists will correspond with the seniority date of the individual involved on the master seniority list, i. e., each individual employee having only one seniority date irrespective of the time that he qualifies for entry upon a given sub-classification seniority list. This will not prevent employees from qualifying for two or more sub-classification seniority lists, except that an employee must establish seniority in at least one additional sub-classification during each 5-year period and failing to do so will be barred from establishing seniority in additional sub-classifications.

(c) The Railway may, as requirements of the service dictate, establish new sub-classification seniority lists or may consolidate existing sub-classification seniority lists.

When consolidations are made, a consolidated sub-classification seniority list will be issued, dovetailing the employees in seniority sequence in accordance with their qualifications. When divisions are made a separate sub-classification seniority list for each sub-classification will be issued, listing employees in seniority sequence according to their qualifications on each new sub-classification.

(d) Seniority lists will be published July 1 of each year and will be open to protest for a period of sixty (60) days from date of posting and, upon presentation of proof of error by an employee, or his representative, such error will be corrected. Seniority dates of all employees shown will be considered as permanently established, except as may be corrected as a result of protest filed within the sixty (60) day period after posting.

*NOTE: Transportation Operating Employees covered by Agreement with B. of L.E., B.L.F. & E., O.R.C. & B. and B.R.T. may also qualify in the Yardmaster sub-classification.

(e) An employee of the Railway covered by this Agreement promoted to an excepted or official position with the Railway, or accepting such position with one of the Organizations parties hereto, will retain his seniority rights provided such rights are ex-

ercised within ninety (90) days of the date that he is released from such official position, unless he obtains additional leave in accordance with the provisions of Article IV.

(f) Sub-classification seniority lists are hereby established as follows:

I - MAINTENANCE OF WAY EMPLOYEES

I-A - Foremen
- I-A-1 - Signal Foremen
- I-A-2 - Specialized Roadway Foremen
- I-A-3 - Specialized B. & B. Foremen
- I-A-4 - Maintenance Foremen
- I-A-5 - Roadway Gang Foremen
- I-A-6 - B. & B. Gang Foremen

I-B - Mechanics
- I-B-1 - Welders
- I-B-2 - Signalmen
- I-B-3 - Equipment Repairmen
- I-B-4 - Heavy Machine Operators
- I-B-5 - Bridgemen
- I-B-6 - Carpenters
- I-B-7 - Light Machine Operators
- I-B-8 - Bridge Tenders Class I

I-C - Helpers
- I-C-1 - Signalman Helpers
- I-C-2 - Welder Helpers
- I-C-3 - Equipment Repairman Helpers
- I-C-4 - Carpenter Helpers
- I-C-5 - Bridgeman Helpers
- I-C-6 - Bridge Tenders Class II

I-C-7 - Apprentice
I-C-8 - Crossing Watchmen

I-D - Laborers
I-D-1 - Laborers
I-D-2 - Cooks

II - *MAINTENANCE OF EQUIPMENT EMPLOYEES*

II-A - Foremen
II-A-1 - Enginehouse Foremen
II-A-2 - Car Foremen
II-A-3 - Machine Shop Foremen
II-A-4 - Electrical Foremen
II-A-5 - Gang Foremen

II-B - Mechanics
II-B-1 - Machinists
II-B-2 - Carmen
II-B-3 - Sheet Metal Workers
II-B-4 - Electricians
II-B-5 - Boilermakers
II-B-6 - Blacksmiths

II-C - Apprentice Mechanics
II-C-1 - Machinist Apprentices
II-C--2 - Carmen Apprentices
II-C-3 - Sheet Metal Workers Apprentices
II-C-4 - Electrician Apprentices
II-C-5 - Mechanics Apprentices

II-D - Helpers
II-D-1 - Helpers and Shop Helpers
(All Classifications)

II-E - Laborers

II-E-1 - Laborers (All Classifications)

III - *OFFICE AND CLERICAL EMPLOYEES*

III-A - Transportation

III-A-1 - Dispatchers
III-A-2 - Yardmasters
III-A-3 - Account Clerk
III-A-4 - Cashier
III-A-5 - O. S. & D. Clerk
III-A-6 - Crew Caller
III-A-7 - Agent-Operator - Class I
III-A-8 - Agent-Operator - Class II
III-A-9 - Stenographer
III-A-10- Agent
III-A-11- Bill Clerk
III-A-12- Warehouse Foreman
III-A-13- Ticket Clerk-Operator
III-A-14- General Clerk
III-A-15- Operator
III-A-16- Yard Clerk
III-A-17- Ticket Clerk
III-A-18- Baggage Clerk
III-A-19- Utility Clerk
III-A-20- Freight Checker
III-A-21- Switchboard Operator
III-A-22- Messenger

III-B - Accounting

III-B-1 - Machine Programmer
III-B-2 - Accountant
III-B-3 - Rate and Division Clerk
III-B-4 - Freight Accountant
III-B-5 - Machine Operator (IBM)

III-B-6 - Bookkeeper
III-B-7 - Voucher Clerk
III-B-8 - Division Clerk
III-B-9 - Rate Clerk
III-B-10- Claim Clerk
III-B-11- Account Clerk
III-B-12- Stenographer
III-B-13- General Clerk
III-B-14- Jr. Claim Clerk
III-B-15- Clerk
III-B-16- Key Punch Operator

III-C - Traffic
III-C-1 - Rate and Adjustment Clerk
III-C-2 - Quotation Clerk
III-C-3 - Ticket Refund Clerk
III-C-4 - Jr. Quotation Clerk
III-C-5 - Stenographer
III-C-6 - General Clerk
III-C-7 - Reservation Clerk
III-C-8 - Ticket Stock Clerk
III-C-9 - Utility Clerk

III-D - Maintenance of Way, Maintenance of Equipment and Stores
III-D-1 - Requisition Clerk
III-D-2 - A. A. R. Clerk
III-D-3 - Purchase Clerk
III-D-4 - Stenographer
III-D-5 - General Clerk
III-D-6 - Utility Clerk

IV - *STATION AND MISCELLANEOUS EMPLOYEES*

IV-A-1 - Station Porters, Red Caps and Laborers
IV-A-2 - Train Porters and Train Attendants
IV-A-3 - Train Maids

ARTICLE III

WORK STOPPAGES.

In the event any dispute shall not be resolved by recourse to the procedures prescribed by the Railway Labor Act of 1926, as amended from time to time, it is agreed that no work stoppage shall occur unless, and until, a secret ballot shall have been taken of all employees represented by the contracting labor organization, establishes that a majority of the employees represented by the contracting labor organization has voted to stop work. If any such work stoppage occurs, secret ballots shall thereafter be taken in the manner described, not less frequently than once each thirty (30) calendar days dating from commencement of the work stoppage, to determine whether a majority of the employees represented by the contracting labor organization has voted to continue), or has voted to terminate the work stoppage (in which case it shall cease, and all of such employees shall return to work under the provisions of this Agreement and in accordance with their seniority.

ARTICLE IV

LEAVE OF ABSENCE.

(a) Leaves of absence will, upon written request, be granted at the discretion of the Management, if the employee can be spared, provided, however, that except in cases of personal sickness or disability, employees will not be granted leaves of absence exceeding ninety (90) days in a calendar year. Employees on leave of absence account personal sickness or disability, supported by certificate of reputable physician if requested by the Management, will be granted leave to the extent dictated by the sickness or disability involved, but employees on leave account sickness or disability engaging in outside employment will forfeit their employment relationship with the Railway except in cases of the Chief Medical Examiner of the Railway barring an employee for physical reasons.

(b) Employees returning to service after having laid off with permission or from leave of absence must notify the proper authority not less than twenty-four (24) hours before reporting time for their runs or jobs.

ARTICLE V

ADVERTISING RUNS, JOBS OR VACANCIES

(a) New runs or jobs and permanent vacancies will be advertised for a period of five (5) calendar days including date of advertisement. Assignments will be made at 12:01 P.M. on the sixth (6th) day

with the senior qualified employee, who has made written application, being assigned thereto. Bids will be accepted only from those employees who have seniority in the sub-classification in which the run, job or vacancy is classified, the bulletin to designate such is known sufficiently in advance, advertisement will be issued, if practicable, so that bids may close prior to the effective date. When not advertised in advance, runs, jobs or permanent vacancies during the period of advertisement will be filled by a senior qualified applicant not holding a regular assignment When it is known in advance that a vacancy will exist for thirty (30) days or more it will be advertised as a permanent vacancy. If an employee requests leave of absence for thirty (30) days or more and returns to service before expiration of the thirty-day (30) period, he will be required to take the same job he vacated, even though a senior employee has bid the assignment he vacated and all employees who have changed assignments as a result of the vacancy having been advertised as a permanent vacancy will return to their former assignments, except as specifically provided herein below.

(b) In the event no applications are received, the senior qualified employee holding seniority in the sub-classification involved, not holding a run, job or vacancy, will be forced to the run, job or vacancy and will remain thereon until displaced through the exercise of seniority or by bidding upon and becoming assigned to another permanent run, job or vacancy.

(c) If an employee is absent on authorized leave during the entire time any run, job or vacancy is advertised for assignment, or during the time that a

temporary vacancy is open for application and, for that reason, did not apply therefor, upon reporting for service he may, if qualified and holds seniority in the sub-classification involved, displace a junior employee who has been assigned to such run job or vacancy during his absence, provided he makes application within (4) days after reporting and then only if he does not otherwise exercise his seniority rights. A junior employee displaced as a result may then exercise his seniority in like manner.

(d) If an employee not holding a regular assignment does not bid upon, or if he bids upon and is the successful applicant but does not protect, a vacancy, run, or job for any reason except for having been on authorized leave of absence, he will be barred from displacing the junior employee who bids in the assignment until such time as he has displacement rights from another regular assignment.

(e) Temporary vacancies of less than thirty (30) days' duration will not be advertised. Such vacancies will be filled by the senior qualified employee holding seniority in the sub-classification involved who is not regularly assigned. Such employee will remain thereon until he is displaced through the exercise of seniority, or he bids upon and becomes assigned to another permanent run, job or vacancy, or the temporary assignment expires. At the expiration of such temporary assignment, the incumbent will be permitted to exercise seniority over any junior employee in the subclassification in which he holds seniority holding a run, job or vacancy, either permanent or temporary, which develops during the period he was on the temporary assignment.

(f) Unassigned employees who have not performed service with the Railway for a period of thirty (30) days or more will be given seven (7) calendar days in which to report for service from the time of recall with the understanding that the Management has the right to use any junior employee available until the recalled employee reports for duty, without penalty accruing to the Railway. Any unassigned employee who has performed service with the Railway within a period of thirty (30) days will be required to report for duty when notified within twenty-four (24) hours, unless leave of absence is granted, or forfeit his seniority with the Railway.

(g) Employees entitled to bulletined positions will be allowed thirty (30) working days in which to qualify, and failing shall retain all their seniority rights, may bid on any bulletined position, but may not displace any regularly assigned employee. when it is definitely determined that the employee cannot qualify (the supervisory officer to be the determining judge) he may be removed before the expiration of thirty (30) working days. After an employee has been assigned to, and performed actual service on, a position in excess of thirty (30) working days, disqualification from the position may be effected only if a formal investigation is conducted under the provisions of Article XIII and the evidence adduced thereby supports such action.

(h) Positions may be established or abolished at any time, consistent with the requirements of the service.

ARTICLE VI

BASIS OF PAY

Basis of pay on all runs, jobs or assignments will be on an hourly rate, eight (8) hours, excluding meal period where granted, constituting a day's work, except as otherwise specifically provided in this Agreement. Work in excess of eight (8) hours in one tour of duty on each day or regular assignment, or in extra service, will be paid for at time and one-half rate.

Regular assignments will be on a five (5) or six (6) day work week basis in accordance with the requirements of the service. Rest days will be on Saturday and/or Sunday, if conditions permit.

ARTICLE VII

REDUCING FORCES

When forces are reduced, fitness, ability and seniority will prevail.

ARTICLE VIII

BEGINNING AND ENDING OF DAY

In all service, the time of employees covered by this Agreement will commence at the time they are required to report for duty and shall continue until they are relieved from duty, except as specifically provided to the contrary herein.

ARTICLE IX

INCREASING FORCES SUBSEQUENT TO REDUCTION

Employees laid off in reduction of force will retain their seniority and will be returned to service in the order of their fitness, ability, qualifications and seniority, provided they file their names and addresses with the employing officer or other properly designated official at time of lay-off, advise him of any change therein, and report for service promptly, but not later than seven (7) days after being notified by mail at the last address on file.

ARTICLE X

REPRESENTATION

The term "duly accredited representative" or "accredited, representative" as used in this Agreement shall be understood to mean the regularly constituted committee, or officers of organizations parties to this Agreement.

ARTICLE XI

EXERCISE OF SENIORITY

Seniority rights of employees covered by these rules may be exercised only in case of vacancy, new positions, reduction in force or when displaced by senior employee, except as provided in Article V(c). Employees displaced, whose seniority rights entitle them to regular positions, shall assert such rights within

seven (7) calendar days. Employees who do not possess seniority to displace another employee or who do not assert their displacement rights within the prescribed time limit will be considered as furloughed.

ARTICLE XII

STARTING TIME

The starting times of employees will be governed by the requirements of the service.

ARTICLE XIII

DISCIPLINE

(a) An employee who has established a seniority date will not be disciplined or dismissed without first being given a fair and impartial hearing, except in cases in which the Management considers the offense sufficiently serious the employee involved may be suspended pending hearing and decision, or when the employee admits responsibility in writing and waives hearing. Reprimands and demerits and further action thereon will be applied in the manner prescribed in paragraph (h) of this Article.

(b) At the hearing the employee involved may be assisted by an employee of his choice of his craft within the scope of the Agreement or a duly accredited representative of his organization. The hearing will be held within ten (10) calendar days from the date the employee is charged with the offense, or held out of service. Decision will be rendered within ten (10) calendar days after completion of the investi-

gation and hearing. Written notice of the hearing and purpose thereof will be sent to the employee at least forty-eight (48) hours in advance of the time set for the hearing to permit him to have witnesses and representatives of his choice present. The time limits provided in this paragraph may be extended by mutual consent.

(c) A transcript of all evidence recorded at the hearing will be furnished the employee, if disciplined, upon his request.

(d) If the charge against the employee is not sustained it shall be stricken from the record. If by reason of such unsustained charge the employee has been removed from the position he held, reinstatement will be made to his former position, provided a senior employee, because of force reduction, or under his displacement rights, has not been awarded such former position in the interim, or it has not been abolished, and payment of wages lost will be allowed on the basis of straight time for each working day held out of service, less any amount he may have earned in or out of the service of the Railway during such time.

(e) If the position has been abolished or if a senior employee, because of force reduction or under his displacement rights, has been awarded the position of the reinstated employee the latter shall place himself in a position in accordance with his seniority rights in the same manner that he would have exercised such rights had he not been out of the service, and will be compensated for the net wage loss at the rate of that position, less any amount he may have

earned in or out of the service of the Railway during such time.

(f) If an employee considers himself unjustly disciplined, or is dissatisfied with the decision referred to in paragraph (a) of this rule, he has the right to appeal in succession up to and including the highest official designated by the Management to handle such cases, provided written notice of appeal is given the official rendering the decision appealed from, within thirty (30) calendar days from the date of the issuance of the decision. This appeal may be made by himself or his duly accredited representative and shall be governed by the provisions of the Time Limit Rule.

If no such appeal is made within that time the case will be considered closed and thereafter barred.

(g) The Railway will not be expected to have present at an investigation employee witnesses who have no personal knowledge of the matter being investigated.

(h) Efficiency will be maintained by reprimand, demerits, or dismissal from the service.

An individual account will be opened with each employee on a record to be kept especially for that purpose in the Office of the Assistant Vice President and Director of Personnel; an entry will be made on such record in each case of neglect of duty, violation of the rules or of good practices, accidents, improper conduct, etc., the same to be determined by the supervisory officer in charge.

Good judgment in emergencies, acts of heroism, loyalty to the service, and other meritorious conduct, will be made matter of record and fully considered in determining the standard of the employee. The record will also be taken into account when the question of promotion is under consideration.

A perfect record is one against which no unfavorable entry has been made. A clear record is one on which unfavorable entries have been cancelled.

Any employee may examine his own record at the Assistant Vice President and Director of Personnel's Office during business hours, but the record will be open to none other excepting the Division and General Officers of the Company.

It not practicable for an employee to visit the office, a transcript of his record will be sent him upon personal request.

A reprimand or demerit will not be noted against an employee's record without written notice to him.

Not less than five demerits will not be noted against multiples of five, but in no case to exceed thirty demerits for any one offense.

Reprimands and demerits placed against the record of an employee, will be cancelled by satisfactory service for various periods, as follows:

(a) A reprimand will be cancelled by a clear record of three months.

(b) Five demerits will be cancelled by a clear record of six months.
(c) Ten demerits will be cancelled by a clear record of nine months.
(d) Thirty demerits will be cancelled by a clear record of one year.
(e) Sixty demerits will be cancelled by a clear record of eighteen months.

An accumulation of ninety (90) demerits will be taken as evidence that the employee is not rendering satisfactory service, and suspension from duty will follow the actual notice of the entry of the ninetieth or more demerit, at which time the entire record will be reviewed and such further action taken as the circumstances warrant. If an appeal of any demerit entry it should be determined that the demerits were not justified, reducing the total below ninety, the provision of ARTICLE XIII (d) will apply.

Disloyalty, dishonesty, desertion, intemperance, immorality, insubordination, incompetency, willful neglect, inexcusable violation of rules resulting in endangering or destroying Company property, jeopardizing the safety of employees or public, making false statements, or concealing facts concerning matters under investigation will, as heretofore, subject the offender to summary dismissal.

No change will be made in the practice of consideration of offenses by the supervisory officer in charge and, ordinarily, no action will be taken until investigation is completed. In cases of intoxication on duty, insubordination, or vicious conduct, em-

ployees will be taken out of the service pending final decision.

Superintendent will issue bulletins once a month, posting them at District and Division terminals. These bulletins are intended to be educational. They will give a brief account of certain violations that resulted in entries being made on records, stating how the trouble or damage could have been avoided - omitting names of persons at fault. Employees are requested to study these bulletins with care, that they may profit by the experience of others.

ARTICLE XIV

TIME LIMITS FOR HANDLING CLAIMS AND GRIEVANCES.

(a) Grievances shall be made in writing within sixty (60) days from the date of the occurrence on which the particular grievance is based. If not filed within said sixty (60) day period, the grievance is barred.

(b) Unless claims are made in writing within sixty (60) days of the date of the occurrence on which the particular claim is based, all claims for compensation shall be limited to the thirty (30) day period next prior to the filing of the same and the remainder of the claim outside of the thirty (30) day period shall be barred.

(c) Decisions by subordinate officers shall be made in writing within thirty (30) days from the date

grievance or claim is received, or within thirty (30) days from the date of conference if one is had thereon, and any appeals therefrom shall be made in writing within thirty (30) days from the date of the decision.

(d) Decisions by the Assistant Vice President and Director of Personnel shall be made in writing, as promptly as possible, and shall be final and binding unless within thirty (30) days after the date of written notice of such decision that officer is notified in writing that his decision is not accepted.

In the event of such notification all grievances or claims involved in such decisions shall be barred unless referred to the appropriate tribunal provided by law within six months from the date of the decision of the Assistant Vice President and Director of Personnel.

(e) All claims of the Railway against employees for overpayment shall be barred unless the Railway shall give notice of such overpayment to the employee involved within sixty (60) days from the date of making such overpayment.

ARTICLE XV

ATTENDING COURT, INQUESTS, ETC.

An employee attending court, inquests, investigations or hearings under instructions from the Railway, as witnesses for Railway, will be paid for each day so held the equivalent of his regular assigned hours at pro rata rate for assigned work days and actual time not exceeding eight hours at pro rata rate

for assigned rest days, plus actual expenses while away from home. Extra or unassigned employees attending court, inquests, investigations or hearings under instructions from the Railway, as witnesses for the Railway, will be allowed a minimum day at the rate of the position on which service was last performed prior to such attendance for each calendar day used as a witness. Free transportation to away-from-headquarters point will be furnished but pay for deadheading will not be allowed. Fees and mileage accruing will be assigned to the Railway. This rule has no application to an employee instructed by the Railway to attend a hearing of charges against him.

ARTICLE XVI

FREE TRANSPORTATION.

Employees covered by this Agreement and those entirely dependent upon them for support will be given the same consideration in granting free transportation as is granted other employees in the service.

ARTICLE XVII

EXAMINATIONS.

Instructions of supervisory officers of the Railway to employees to undergo physical or mental examinations shall be promptly complied with, the Company to pay for any such examinations made at its direction. The Company reserves the right to select its own medical examiner or physician. No compensation shall be due an employee for undergoing examination.

ARTICLE XVIII

VACATIONS.

1. (a) Effective with the calendar year 1963, an annual vacation of one (1) week with pay, or pay in lieu thereof, will be granted to each employee of the Florida East Coast Railway Company who renders compensated service as an employee of the Florida East Coast Railway Company on not less than one hundred sixty (160) days during the preceding calendar year with qualifying days being computed on the basis of one (1) day for each tour of duty of eight (8) hours and overtime if any.

(b) Effective with the calendar year 1963, an annual vacation of two (2) weeks with pay, or pay in lieu thereof, will be granted to each employee of the Florida East Coast Railway Company who renders compensated service as an employee of the Florida East Coast Railway Company on not less than one hundred sixty (160) days during the preceding calendar year and who has five (5) or more years of continuous service with the Florida East Coast Railway Company and has rendered compensated service on not less than 800 days in said five year period with qualifying days being computed on the basis of one (1) day for each tour of duty of eight (8) hours and overtime if any.

(c) Effective with the calendar year 1963, an annual vacation of three (3) weeks with pay, or pay in lieu thereof, will be granted to each employee of the Florida East Coast Railway Company who renders compensated service as an employee of the Flori-

da East Coast Railway Company on not less than one hundred sixty (160) days during the preceding calendar year and who has fifteen (15) or more years of continuous service with the Florida East Coast Railway Company and has rendered compensated service on not less than 2,400 days in said fifteen year period with qualifying days being computed on the basis of one (1) day for each tour of duty of eight (8) hours and overtime if any.

(d) Continuous employment is broken by voluntary resignation, discharge for cause, or any other voluntary separation from the service.

2. (a) The vacation period due in any one year must be taken during that year - vacation periods being neither accumulative nor transferable.

(b) The Company reserves the right to schedule the vacation period for each employee, as well as to generally administer the vacation plan, in accordance with the above provisions, with the understanding, of course, that vacation periods will be scheduled to the greatest extent possible, commensurate with the requirements of the service, on the seniority principle.

ARTICLE XIX

VACATION PAY.

(a) The amount of vacation pay for the vacation period for one (1) year employee shall be the equivalent of forty (40) hours pay at the rate of the last service performed prior to the beginning of the vaca-

tion period, or 1/52 of his prior year's earnings, whichever is the greater.

(b) The amount of vacation pay for the vacation period of each five (5) year employee shall be the equivalent of eighty (80) hours' pay at the rate of the last service performed prior to the beginning of the vacation period, or 1/26 of his prior year's earnings, whichever is the greater.

(c) The amount of vacation pay for the vacation period of each fifteen (15) year employee shall be the equivalent of 120 hours' pay at the rate of the last service performed prior to the beginning of the vacation period, or 3/52 of his prior year's earnings, whichever is the greater.

ARTICLE XX

RETIREMENT:

(a) Effective six (6) months following the date of this Agreement seniority rights of all employees shall terminate and they shall not be permitted to work as employees of the Railway after the last day of the calendar month in which they attain the age of 70, except that this mandatory retirement age shall be progressively lowered until it is 65, effective July 1, 1968, in accordance with the following schedule:

July 1, 1964 - 69 years of age
July 1, 1965 - 68 years of age
July 1, 1966 - 67 years of age
July 1, 1967 - 66 years of age
July 1, 1968 - 65 years of age

(b) Employees attaining stated ages under the formula cited above shall terminate their seniority rights and they shall not be permitted to work in that capacity after the last day of the calendar month in which the age is attained.

ARTICLE XXI

HOLIDAY PAY.

(a) All rates of pay as adjusted (see Article I) reflect payment, at straight time rate, for the following holidays:

New Year's Day
Washington's Birthday
Decoration Day
Fourth of July
Labor Day
Thanksgiving Day
Christmas Day

NOTE: Should any specified holiday fall on Sunday, the day observed by the State, Nation or by proclamation shall be considered the holiday.

(b) No allowances will be due for holiday pay unless service is performed on a designated holiday, in which event the employee performing the service will be allowed pay at the time and one-half rate of the position on which service is performed.

ARTICLE XXII

HEALTH AND WELFARE BENEFITS AND INSURANCE.

All employees covered by this Agreement will be eligible for Employee Health Insurance Benefits, Dependents Health Insurance Benefits and Employee Life Insurance Benefits, said plan to be established and administered by the Management of the Company.

ARTICLE XXIII

NEW EMPLOYEES.

An applicant for employment, who enters the service of the Railway, will be accepted or rejected within forty-five (45) days from the date he establishes seniority. If not notified to the contrary within the time stated, it will be understood his application has been accepted. In the event of applicant giving materially false information, the forty-five (45) day time limit will not apply.

ARTICLE XXIV

ELECTRIC LANTERNS.

(a) All employees whose work requires it will equip themselves, at their own expense, with electric lanterns, and, at their own expense, keep the same in good repair, and when necessary, at their expense, provide renewals of same.

(b) The Railway agrees that it will participate to the extent of 50% of the cost of the batteries and bulbs necessary to service the electric lanterns to be provided by the employees above.

ARTICLE XXV

INTERMITTENT SERVICE.

(a) Where service is intermittent, eight (8) hours' actual time on duty within a spread of twelve (12) hours shall constitute a day's work. Employees filling such positions shall be paid overtime for all time actually on duty or held for duty in excess of eight (8) hours from the time required to report for duty to the time of release within twelve (12) consecutive hours computed continuously from the time first required to report until final release. Time shall be counted as continuous service in all cases where the interval of release from duty does not exceed one (1) hour.

(b) Exception to the foregoing paragraph shall be made for individual positions when agreed to between the Management and duly accredited representatives of the employees. For such exceptioned positions the foregoing paragraph shall not apply.

(c) Employees covered by this rule will be paid not less than eight (8) hours within a spread of twelve (12) consecutive hours.

ARTICLE XXVI

MEAL PERIOD.

The regular meal period shall not be less than thirty (30) minutes or more than one (1) hour, except in cases of emergency, or where assignments require eight (8) hours of continuous labor, in which case not to exceed twenty (20) minutes will be allowed therein in which to eat, without deduction in pay.

ARTICLE XXVII

AVAILABILITY FOR CALLS.

Employees occupying positions whose duties normally subject them to calls because of unanticipated happenings will not be paid for holding themselves within a reasonable distance of headquarters in readiness for calls, which they will do unless relieved by supervisory officers.

ARTICLE XXVIII

EXCEPTION TO BASIC DAY.

When conditions beyond control of Management prevent employees from performing their normal duties, only the hours between the beginning and release from duty, exclusive of meal period, shall be paid for, with a minimum of two hours being allowed each employee who reports for duty.

ARTICLE XXIX

NOTIFIED OR CALLED.

(a) Employees notified or called to perform work not continuous with the regular work period will be allowed a minimum of two (2) hours at time and one-half rate for two (2) hours' work or less, and if held on duty in excess of two hours time and one-half will be allowed on the minute basis. Each call to duty after being released shall be a separate call.

(b) Employees required to report for duty before the assigned starting time and who continue to work through the regular shift, shall be paid two (2) hours at time and one-half rate for two (2) hours' work or less, and at the time and one-half rate thereafter on the minute basis for the time required to work in advance of the regular starting time.

ARTICLE XXX

DATE EFFECTIVE AND CHANGES

This Agreement shall be effective October 25, 1963, superseding all other rules, agreements and understandings in conflict herewith, as well as check-off agreements.

This Agreement shall remain in effect until changed in accordance with the Railway Labor Act, as amended, except that there shall be no change in rates of pay or rules for a period of two years following the effective date of this Agreement.

Signed at St. Augustine, Florida this ——— day of 1963.

CARRIER'S APPENDIX "A"

Code No.	*Organization*
1.	International Association of Railway Employees.
2.	Brotherhood of Railway and Steamship Station Employes.
3.	Order of Railroad Telegraphers.
4.	American Train Dispatchers Association.
5.	Railroad Yardmasters of America.
6.	United Transport Service Employees of America.
7.	Brotherhood of Maintenance of Way Employees.
8.	Brotherhood of Railroad Signalmen of America.
9.	International Association of Machinists.
10.	International Brotherhood Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers.

11. Sheet Metal Workers International Association.

12. International Brotherhood of Electrical Workers.

13. Brotherhood Railway Carmen of America.

14. International Brotherhood of Firemen and Oilers.

15. American Railway Supervisors Association.

16. Dining Car Employees Union.

17. System Federation No. 69, AFL-CIO.

EXHIBIT 13

WESTERN UNION
TELEGRAM

RDA003 846A EST OCT 28 63 NHCO12 SPOC090 AA254
W A STA091 PD
FAX ST AUGUSTINE FLO 25 453P EST

EC THOMPSON, EXEC SECY
NATL MEDIATION BOARD WASHDC

RETEL DATE CONCERNING APPLICATION OF NON-OPERATING ORGANIZATIONS OCTOBER 23

FOR SERVICES OF YOUR BOARD IN CONNECTION WITH RAILWAY'S SECTION 6 NOTICE OF SEPTEMBER 24 TO REVISE WORKING AGREEMENTS. THE RECORD WILL REFLECT THAT ORGANIZATIONS REFUSED TO ENTER INTO COLLECTIVE BARGAINING AS REQUIRED BY SECTION 2 FIRST ON UNTENABLE POSITION THAT PRESENCE OF COURT REPORTER IN CONFLICT WITH REQUIREMENTS OF RAILWAY LABOR ACT. IT IS RAILWAY'S POSITION THAT NO PROVISION, OF THAT ACT PROHIBITS PRESENCE OF COURT REPORTER, CONSEQUENTLY, ORGANIZATION FAILED TO FULFILL THEIR OBLIGATION TO NEGOTIATE RAILWAY'S NOTICE AND ARE NOT NOW IN POSITION TO AVAIL THEMSELVES OF SERVICES OF THE MEDIATION BOARD, RAILWAY ENJOYING RIGHT TO PLACE PROPOSED RULES INTO EFFECT 10 DAYS FROM TERMINATION OF CONFERENCE BY EMPLOYES ON OCTOBER 18, 1963

R. W. WYCKOFF ASSISTANT VICE PRESIDENT AND DIRECTOR OF PERSONNEL F. T. C. RAILWAY CO

23 6 24 2 10 18 1963
1233.

EXHIBIT 14

FLORIDA EAST COAST RAILWAY COMPANY
St. Augustine, Florida,
October 30, 1963
2

CERTIFIED MAIL- RETURN RECEIPT REQUESTED DELIVER TO ADDRESSEE ONLY

Mr. W. F. Howard, General Chairman
Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express and Station Employes
1019 Colombo Street
Jacksonville 7, Florida.

Mr. I. E. Hamilton, General Chairman
The Order of Railroad Telegraphers
725 Canal Street
New Smyrna Beach, Florida

Mr. R. W. McDougall, General Chairman
International Association of Machinists
4631 Post Street
Jacksonville 5, Florida

Mr. T. B. Steadman, General Chairman
International Brotherhood Boilermakers,
Iron Ship Builders, Blacksmiths, Forgers
and Helpers
158 Cleveland Park Drive
Spartanburg, South Carolina

Mr. R. L. Lanier, General Chairman
Sheet Metal Workers International Association
1658 Lakewood Road
Jacksonville 7, Florida

Mr. C. A. Dupont, General Chairman
International Brotherhood of Electrical Workers
18 Poinciana Avenue
St. Augustine, Florida

Mr. R. M. Cooke, General Chairman
Brotherhood Railway Carmen of America
P. O. Box 34
New Smyrna Beach, Florida

Mr. Ray Abner, General Chairman
International Brotherhood of Firemen and Oilers
1004 Hoffman Building
Louisville 2, Ky.

Mr. J. E. Dubberly, General Chairman
Brotherhood of Railroad Signalmen
P. O. Box 6083
Daytona Beach, Florida

Mr. C. L. Winstead, General Chairman
Brotherhood of Maintenance of Way Employees
Room 502, 218 West Church Street Building
Jacksonville 2, Florida

Mr. C. J. Robbins, General Chairman
American Train Dispatchers Association
Route #1
New Smyrna Beach, Florida

Mr. C. W. Puckett, President and General Chairman
The American Railway Supervisors Association
4565 N. W. 4th Street
Miami 44, Florida

Mr. J. E. Miller, General Chairman
Railroad Yardmasters of America
Route #1 - Box 318 (c/o)Mr. John W. Lucas)
Barboursville, Va.

Mr. Albert Florence, General Chairman
United Transport Service Employes (Train Porters)
1445 Prince Street
Jacksonville 9, Florida

Mr. Claybourne Brooks, General Chairman
United Transport Service Employes (Red Caps)
P. O. Box 6381 - Station B
Miami 36, Florida

Mr. W. S. Seltzer, General Chairman
Dining Car Employees' Union, Local 351
4306 South Michigan Avenue
Chicago 53, Illinois

Gentlemen:

On September 24, 1963, I served Notice on you, pursuant to Section 6 of the Railway Labor Act, of desire to revise effective October 25, 1963, Agreements with your respective Organizations to the extent set forth in the proposed Agreement appended to that Notice.

Conference on this matter was scheduled for 10:00 A.M., Friday, October 18, 1963, in the Meeting Room

of the Monson Motor Lodge, 32 Bay Street, St. Augustine, Florida. All organizational representatives attending that conference refused to enter into negotiations on my Notice solely for the reason, as expressed by General Chairman W. F. Howard who acted as spokesman for those present, that a Court Reporter was present to make a record of the proceedings.

Your attention was directed to the fact that the presence of a Court Reporter was not in conflict with the spirit, intent or expressed provisions of the Railway Labor Act as alleged by Mr. Howard, but, to the contrary, enabled the parties to have a record to refer to in the event any question should arise in the future as to what actually transpired at the meeting. Attention was also directed to the fact that there have been a number of conferences held on this property, involving Labor matters arising under the Railway Labor Act, at which Court Reporters have been present, attended by both Grand Lodge and Local Representatives of the various Organizations. Notwithstanding these facts, all organizational representatives present refused to engage in negotiations on my Notice and departed, thus terminating conferences on the Notice.

On October 25, 1963, Western Union message was received from the National Mediation Board advising that your Organizations had filed application for the mediatory services of the Board. It is the position of the Railway, however, that since the Organizations refused to enter into Collective Bargaining on the Railway's Notice of September 24, 1963, as required under the provisions of Section 6 of the Railway Labor

Act, using the presence of a Court Reporter as an excuse to evade their responsibilities under that Act, the Organizations are not now in position under said Railway Labor Act to make valid request for the mediatory services of the National Mediation Board. In view of these circumstances, pursuant to the provisions of Section 6 of the Railway Labor Act, as amended, this will constitute notice of the Railway placing in effect, as of this date, the proposed Agreement appended to its Notice to you of September 24, 1963.

Yours very truly,

(Signed) R. W. WYCKOFF
Assistant Vice President and
Director of Personnel.

RWW-1
CO: Mr. E. C. Thompson, Exec. Secy.
Illegible

Received: Nov. 6, 1963

EXHIBIT 15

NATIONAL MEDIATION BOARD

F-MD FD

10-31-63

R. W. WYCKOFF
ASSISTANT VICE PRESIDENT & DIRECTOR OF PERSONNEL
FLORIDA EAST COAST RAILWAY COMPANY
ST. AUGUSTINE, FLORIDA

G. E. LEIGHTY, CHAIRMAN
COOPERATING RAILWAY LABOR
ORGANIZATIONS
C/O THE ORDER OF RAILROAD TELEGRAPHERS
3860 LIBELL BOULEVARD
ST. LOUIS, MISSOURI

RE MEDIATION APPLICATION FILED BY NON-OPERATING LABOR ORGANIZATION ON THE FLORIDA EAST COAST RAILWAY CONCERNING CARRIER'S NOTICE TO THOSE ORGANIZATIONS DATED SEPTEMBER 24, 1963, TO MAKE EFFECTIVE PROPOSED AGREEMENT. BOARD CONSIDERED CARRIER'S POSITION IN EXECUTIVE SESSION ON OCTOBER 25, 1963, AND IS OF THE OPINION APPLICATION HAS BEEN PROPERLY FILED UNDER PROVISIONS OF RAILWAY LABOR ACT. BOARD HAS TODAY DOCKETED THIS APPLICATION AS CASE A-7055 AND MEDIATOR WILL BE ASSIGNED CONSISTENT WITH PRIOR COMMITMENTS. THE ATTENTION OF ALL CONCERNED IS CALLED TO PROVISIONS OF SECTION 6 OF THE ACT. JOINT WYCKOFF AND LEIGHTY.

E. C. THOMPSON,
EXECUTIVE SECRETARY
NATIONAL MEDIATION
BOARD

6-sad

EXHIBIT 16

THE ORDER OF RAILROAD TELEGRAPHERS
3860 Lindell Boulevard
St. Louis 8, Mo.

G. E. Leighty
President

Telephone
Jefferson 3-8321

November 12, 1963

Mr. E. C. Thompson, Exec. Secretary
National Mediation Board
Washington, D. C. 20572

SUBJECT: MB-456 - Case A - 7055
Proposed Cancellation Seventeen
Florida East Coast Railway

Dear Sir:

I refer you to the application I made to you as Chairman of the Cooperating Railway Labor Organizations on behalf of the Chief Executives of those organizations October 23, 1963, seeking your Board's services in connection with the formal notice served on the said organizations by the Management of the Florida East Coast Railway September 24, 1963, wherein it proposed to terminate the several collective bargaining agreements in effect between the Car-

rier and these said organizations. On Attachment A of the letter seeking your Board's services, the second page, I listed the names of the organizations parties to this dispute. You will find listed thereon the International Association of Railway Employees.

This letter is to advise that Mr. J. W. Whitaker, President of the International Association of Railway Employees, has addressed a letter to me asking this his organization be eliminated from this mediation dispute as he has made other arrangements for handling his portion of the dispute.

Will you please, therefore, eliminate hereafter from this particular mediation Case A-7055 the International Association of Railway Employees.

Yours respectfully,

(Signed) G. E. LEIGHTY
Chairman
Cooperating Railway Labor Organizations

cc: Mr. J. W. Whitaker
Mr. G. M. Harrison
Mr. C. L. Dennis
Mr. G. E. Leighty
Mr. H. C. Crotty
Mr. Jesse Clark
Mr. A. J. Hayes
Mr. R. K. Berg
Mr. E. H. Wolfe
Mr. E. F. Carlough
Mr. Gordon Freeman
Mr. A. J. Bernhardt

Mr. Anthony Matz
Mr. R. C. Coutts
Mr. J. P. Tahney
Mr. M. G. Schoch
Mr. Eugene Frazier
Mr. E. S. Miller
Mr. Michael Fox
Mr. Howard Pickett
Mr. J. W. Ramsey
Mr. Erick Erickson
Mr. Harold Buoy
Mr. J. W. O'Brien
Mr. T. V. Ramsey
Mr. J. B. Zink
Mr. R. W. Smith
Mr. L. P. Schoene
Mr E. L. Oliver
Mr. D. S. Beattie
Mr. O. C. Jones
Mr. I. E. Hamilton
Mr. J. H. Hadley

For Information Only:
Mr. R. E. Davidson
Mr. H. E. Gilbert
Mr. Louis Wagner
Mr. Charles Luna
Mr. N. P. Speirs

Received: Nov. 14, 1963

EXHIBIT 17

REPORT
to
THE PRESIDENT
By The
EMERGENCY BOARD

CREATED BY EXECUTIVE ORDER 11127 DATED NOVEMBER 9, 1963, PURSUANT TO SECTION 10 OF THE RAILWAY LABOR ACT, AS AMENDED

— — —

To Investigate a Dispute Between Florida East Coast Railway and Certain of its Employees Represented by Eleven Cooperating Railway Labor Organizations

(NMB CASE A-6627, Sub No. 1)

— — —

WASHINGTON, D. C.
DECEMBER 23, 1963

(Emergency Board No. 157)

LETTER OF TRANSMITTAL

Washington, D. C., December 23, 1963.

The President,
The White House.

Mr. President: The Emergency Board created by President John F. Kennedy on November 9, 1963, by

Executive Order 11127, pursuant to Section 10 of the Railway Labor Act, as amended, to investigate a dispute between the Florida East Coast Railway and certain of its employees represented by 11 cooperating labor organizations, has the honor to submit herewith its report and recommendations based upon its investigation of the issues in dispute.

Respectfully submitted.

HARRY H. PLATT, Chairman.
DEREK BOK, Member.
PAUL N. GUTHRIE, Member.

(III)

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(V)

REPORT TO THE PRESIDENT BY EMERGENCY BOARD NO. 157

Created by Executive Order 11127 dated November 9, 1963, pursuant to Section 10 of the Railway Labor Act, as amended

This is an Emergency Board Report which relates the facts and makes recommendations concerning a dispute between the Florida East Coast Railway (FEC) and certain of its nonoperating employees represented by 11 cooperating organizations. A determination has been made that this dispute threatens to interrupt interstate commerce to such a degree as to deprive a section of the country of essential transportation services.

I. INTRODUCTION

The 11 cooperating organizations represent 73 (ICC) classes of nonoperating employees, numbering a half million persons. These individuals have jobs on more than 200-line-haul railroads. Among them are approximately 1,300 nonoperating personnel employed by the Florida East Coast Railway.

The Carrier was first incorporated on May 28, 1892, under the name of the Florida Coast & Gulf Railway Co. The present name was adopted in 1895. The Florida East Coast Railway currently owns some 572 miles of road and 1,257 miles of track, all of which are situated

in the State of Florida. A main trunk line commences in Jacksonville and runs in a southerly direction through Fort Lauderdale, West Palm Beach, and Miami, terminating in Florida City. Branch lines extend from the trunk to Maytown, Benson Springs, South Miami, and Lake Harbor. In addition, the railroad is presently constructing a spur which will connect with a line being built by the U.S. Government so as to link the main trunk with the complex of defense installations on Cape Kennedy and Merritt Island.

Apart from its railroad equipment and facilities, the Carrier owns various industrial properties and also holds all the capital stock of the Florida East Coast Highway Dispatch Co., a firm engaged in the carriage of freight by truck. In addition, the railroad owns part interest in certain terminal facilities, namely, the Atlantic & East Coast Terminal Co. and the Jacksonville Terminal Co.

The FEC was placed in receivership in 1931. In the ensuing years, various reorganization plans were submitted. After several proposals had been rejected by the courts, the plan was finally approved in 1960, and the present management took over the company on January 1, 1961. Pursuant to the reorganization, the Railroad was capitalized at approximately $85 million. The capitalization included $22.5 million in first mortgage bonds, an equal amount of second mortgage bonds, and $36 million in common stock.[1] A majority of the

[1]The first mortgage bonds are 50-year debentures carrying a fixed interest obligation of 5 percent. The second mortgage bonds are 50-year debentures with contingent interest at the rate of 5½ percent, payable to the extent earned and cumulative up to an amount exceeding 16½ percent. In addition to the first and second mortgage bonds and the common stock, the capitalization included $4,070,588 in equipment obligations.

first and second mortgage bonds and most of the common stock were held, and are still owned, by the estate of Alfred I. Du Pont, either directly or through a wholly owner corporation, the St. Joe Paper Co.

II. THE DISPUTE

The origin of this dispute may be traced to September 1, 1961, when the 11 nonoperating organizations served identical "Section 6" notices on virtually all Class I railroads throughout the country. In these notices, the organizations informed the carriers of their desire to revise existing agreements in order to provide for an across-the-board wage increase of 25 cents per hour and a requirement of 6 months' advance notice from the Carrier prior to laying off or abolishing the positions of employees, save in certain emergency situations. Thereafter, all the carriers submitted identical counterproposals to the organizations providing for wage reductions of 20 percent and more, and for 24 hours' advance notice in the case of abolition of jobs or reductions in force. When efforts to settle the dispute through collective bargaining and mediation proved unsuccessful, Emergency Board No. 145 was created on March 3, 1962. After extensive hearings, this Board made the following recommendations.

1. That all rates of pay be increased by 4 cents per hour effective February 1, 1962.

2. That all rates of pay existing on May 1, 1962, be increased as of that date by 2½ percent.

3. That the parties agree not to file Section 6 notices to revise rates of pay before May 1, 1963.

4. That the parties agree upon a rule requiring at least 5 working days' notice to all regularly assigned employees before abolishing their jobs, except as provided in Article VI of the agreement of August 24, 1954.

After the submission of this report, the parties negotiated and agreed to convert the 2½-percent increase to a uniform cents-per-hour equivalent, which was computed at 6.28 cents. Subject to this one amendment, all Class I railroads signed agreements in June of 1962 on the basis of the Emergency Board's recommendations except for the Florida East Coast and two other carriers. The two other railroads had not been served with the original Section 6 notices since one was in the process of going out of business while the other was about to be absorbed by another carrier. Hence, the Florida East Coast became the only Class I carrier in the country which did not accept the terms of the national agreement.

For many years the Florida East Coast had regularly participated in the national handling of negotiations between the carriers and the nonoperating employee organizations. The organizations submitted the same Section 6 notice to FEC in 1961 as they served on all other Class I carriers. Moreover, FEC joined in submitting identical counterproposals to the organizations. On February 9, 1962, however, FEC notified the organizations that it would not participate in the national handling or consider itself bound by the settlement resulting from these negotiations. As previously noted, the Carrier subsequently declined to accept the agreement of June 5, 1962.

After FEC had rejected the national settlement, mediation was invoked on July 20. Following the appointment of a mediator, bargaining took place on August 20-23. In these negotiations, the Carrier claimed it could not afford to meet the terms of the national settlement. Instead, it offered a series of proposals which varied in detail but were designed primarily to achieve two objectives. In the first place, FEC sought to extend the moratorium on changes in compensation for a longer period than was provided in the national settlement. Second, it attempted to reduce the cost of the settlement by providing for lower wage increases, at least for 1962 and 1963.

When the organizations were unable to accept any of the Carrier's proposals, the negotiations terminated. Pursuant to Section 5 of the Railway Labor Act, the National Mediation Board requested both parties to submit their differences to arbitration. The carrier and the organizations declined this request.

In November 1962, the railroad attempted without success to induce the National Mediation Board to initiate steps toward the creation of an emergency board. Clarifying its position on January 23, 1963, the Board declared:

> . . . the issues in this dispute are the same as were fully and adequately heard by Presidential Emergency Board No. 145 . . . . The Railway Labor Act never contemplated that Presidential Emergency Boards would be created to consider identical issues arising on separate railroads. To proceed in that manner would weaken or destroy the effectiveness of the Act. The Board feels that this dispute could and should be resolved by a small amount of bona fide collective bargaining.

Further negotiations took place in December 1962. At this time, the Carrier presented a final offer to the organizations. Under the terms of this proposal, the Carrier agreed to provide a wage increase of 1 2/3 percent from February 1962 to March 1963; a further increase of 1 2/3 percent from March 1963 to August 31, 1963; and a final increase of 1 2/3 percent effective September 1, 1963. According to the Carrier's estimates, this offer would result in higher rates of pay after September 1963 than the 10.28 cents per hour provided in the national settlement. On the other hand, the organizations were asked to agree to a moratorium extending to March 1, 1964, and to rates of pay below the national settlement from February 1962 until September 1963. The organizations replied that they would seriously consider this offer if the Carrier would agree to an additional increase of 7 cents per hour effective March 1, 1963 to compensate for the longer moratorium. When the Carrier rejected this proposal, the negotiations were terminated.

On January 23, 1963, the employees struck. Seven days before the commencement of the strike, the Carrier gave notice that all nonoperating jobs were abolished as of the strike date. Picket lines were established, which were honored by the operating employees. As a result of these actions, the Carrier was totally shut down for approximately a week. Thereafter, the railroad began to advertise jobs and to hire new employees when the strikers refused to bid on the available positions. With the aid of these replacements, supplemented by supervisory personnel and by a few returning strikers, the railroad began to resume freight operations on a limited scale.

As the strike continued, Secretary of Labor Wirtz

sought to arrange a peaceful settlement of the dispute. On April 3 and on May 17, he requested that the parties agree to resolve their differences through arbitration. Although the organizations now expressed their willingness to arbitrate, the Carrier once again refused.

On September 24, 1963, the Carrier served Section 6 notices on both the operating and the nonoperating organizations, proposing sweeping changes in the existing agreements. For example, under the FEC proposals, management was to exercise exclusive control over such matters as discipline, promotions, job assignments, and work rules. Seniority lists were to be reorganized to abolish traditional craft lines and substitute four master seniority groups in their place. Wages were adjusted to provide the same rates of pay for employees performing substantially similar work. Strike ballots were to be conducted prior to the initiation of any work stoppage, and further ballots would be required every 30 days until the conclusion of the strike. Of the various organizations receiving these notices, only the International Association of Railway Employees and the Brotherhood of Railroad Trainmen agreed to negotiate with the company. As a result, the Carrier placed its proposals into effect on October 30 with respect to the nonoperating organizations and took similar action on November 4 for those operating crafts which had not agreed to negotiate with the company.

By the late summer of 1963 the Carrier had succeeded in restoring the greater part of its normal freight operations. Nevertheless, it refrained from restoring passenger service, claiming that it would be unsafe to do so in view of the numerous acts of van-

dalism occurring on the railroad. Moreover, the Carrier did not attempt to provide less-than-carload service. For these and other reasons, numerous complaints were made to public officials by shippers, civic groups, and business organizations protesting the lack of adequate rail service on the Florida East Coast. On July 31, 1963, the Florida Public Utilities Commission issued a report in which it reviewed these complaints and concluded that the railroad had failed to maintain adequate service, disregarded standards of safe operation, and neglected to maintain its right-of-way, structures, switches, signals, and rolling stock in a safe or satisfactory manner.

On September 24, President Kennedy ordered that an investigation be held to determine the effect of the strike on the Nation's defense and space programs.[2] A Board of Inquiry of representatives from the Departments of Defense and Labor from the National Aeronautics and Space Administration was constituted to conduct the investigation. After holding hearings in Florida, the Board of Inquiry submitted a report on October 10 which concluded that "this labor dispute is currently and potentially detrimental to our Nation's defense and space efforts." The Board recommended that the parties resume negotiations and give serious consideration to submitting their differences to arbitration.[3]

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[2]App. A—5.

[3]The Board also recommended that NASA and the Air Force establish an embargo until the dispute was settled on all shipments traveling over the Florida East Coast under Government bills of lading. We are unaware of the extent, if any, to which the embargo has been placed in effect.

On October 14, President Kennedy acknowledged receipt of the report. Expressing concern over the continuing impact of the strike, he urged the National Mediation Board to contact the parties and persuade them promptly to resume negotiations.[4] After further mediation efforts proved unsuccessful, the Board again made a proffer of arbitration. Although the organizations reaffirmed their willingness to arbitrate, the Carrier declined the proffer. The Mediation Board then determined that the dispute threatened to deprive a section of the country of essential transportation services, and President Kennedy issued Executive Order 11127 on November 9, creating Emergency Board No. 157. Named to the Board were Harry H. Platt of Detroit, Mich., as Chairman, and Derek Bok of Cambridge, Mass., and Paul N. Guthrie of Chapel Hill, N. C., as members.

The Emergency Board convened in Jacksonville, Fla., on November 20, 1963. By this time, the Carrier had hired 417 replacements and 76 strikers, in addition, the company's 250-odd supervisors performed at least some of the tasks formerly done by the craft employees. With this work force, the Carrier had restored freight operations and had achieved a level of car loadings during the first 2 weeks of November which it claims was at least as great as the figure for the corresponding period in 1962. On the other hand, the Carrier was still not accepting less-than-carload shipments and had not resumed passenger operations.

The Emergency Board held hearings from November 20 until December 9. The hearings were recessed from

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[4]App. A-7.

November 23 to December 3 because of the death of President Kennedy. In view of the recess, both parties agreed that the date for the submission of this report might be extended to December 19. Thereafter, the parties agreed to support a further extension to December 24. Both extensions were subsequently granted by President Johnson.

III. SCOPE OF ISSUES AND POSITIONS OF THE PARTIES

A threshold issue in this dispute is whether the striking employees should be reinstated by the Carrier. The organizations contend that the Carrier is obliged by Section 10 of the Railway Labor Act to reinstate all of the strikers immediately. The railroad denies that it is under any legal obligation to return the strikers to their jobs and insists it will not discharge any of the replacements to enable the strikers to return to work. As a result, though the Carrier has not refused categorically to rehire the strikers, it is only willing to take them back as job openings become available. Some 300 jobs may be restored when FEC resumes normal passenger operations, but since the Carrier insists that it can operate efficiently with many fewer men than were employed before the strike, it does not anticipate hiring more than a fraction of the strikers in the foreseeable future.

The second issue to be considered involves the wage rates to be paid by the Carrier. The organizations have argued that FEC should grant more wage increases on the same terms as provided in the national settlement of June 1962. The organizations stress the importance of uniform national wage movements in maintaining

stable relations in the railroad industry; they deny that the financial position of the railroad or its future prospects are materially different from those of many other carriers which signed the 1962 agreement. On the other hand, the Carrier points out that it did not participate in the national handling and contends that it cannot afford to meet the terms of the 1962 agreement. Moreover, the railroad argues that the wages now paid to its nonoperating personnel greatly exceed the rates paid to employees performing comparable work in other industries in Florida.

The Carrier and the organizations also disagree on the question of whether advance notice should be required of the company before abolishing jobs or affecting a reduction in force. The organizations insist that FEC should agree to give 5 working days' notice, as provided in the 1962 national agreement. While the Carrier has not clearly indicated its views on this matter during the hearings, it presumably takes the position reflected in its Section 6 notice of September 24, 1963, that no notice whatever should be required.

The parties agree that the issues set forth above fall within the scope of the inquiry to be conducted by this Board. The Carrier indicated in its opening argument, however, that the Board should also consider all of the proposals included in its Section 6 notice of September 24, 1963. The Carrier further suggests that the Board should consider all unresolved issues between FEC and the operating organizations, arguing that these differences must be resolved before a lasting settlement of this dispute can be achieved.

Having considered these arguments, the Board has

concluded that the scope of this report should not be broadened to include the additional issues suggested by the Carrier. In the first place, we doubt whether the Carrier genuinely desires the Board to consider these matters, since it did not make a serious attempt to introduce evidence on the questions involved. Moreover, it should be observed that the Executive order creating this Board did not refer to the operating crafts nor did these organizations participate in any way in these hearings. As a result, it seems clearly inappropriate to make any recommendations respecting their differences with the railroad. As for the company's notice of September 24, 1963, we note that the proposals contained therein contemplate drastic changes in the conditions previously in effect on this and other railroads. We further note that the parties have not engaged in any negotiations on these proposals and that a vast number of separate issues are involved. As a result, it would be premature and hardly feasible for this Board to comment on the proposals.

IV. GENERAL DISCUSSION, FINDINGS AND CONCLUSIONS

A. Reinstatement of Striking Employees

Both parties have advanced legal arguments bearing on the question of whether the Carrier is obliged Railway Labor Act. Having considered these arguments, the Board is of the opinion that the Federal courts provide a more suitable forum for resolving the *legal* issues involved. We are also informed that an action under Section 10 has recently been brought against FEC by the Department of Justice and that a

district judge has declined to order the Carrier to reinstate the strikers. Under these circumstances, the Board has concluded that it would be inappropriate to express an opinion on the application of Section 10.

By deferring in this manner to the Federal courts, the Board is not relieved of all responsibility with respect to the reinstatement of the striking employees. Emergency boards have traditionally undertaken the task of making recammendations which will provide a basis for settling the dispute in a fair and reasonable manner. As a result, this Board feels obliged to explore the issue of reinstatement, for whether or not the Carrier is legally bound to take back the strikers, it may still be found that the reinstatement of these men would contribute to an equitable and lasting settlement of this dispute.

Both the striking employees and the replacements have an interest in filling the jobs that now exist on the railroad. In evaluating the positions of these two groups, the Board has placed great weight on the long periods of service that the strikers have given to the Carrier. It is universally recognized, as a matter of sound labor relations, that seniority provides the employee with an equitable interest in continued employment. Representatives of the Carrier have suggetsed that the strikers do not deserve any special consideration for their years of service because they elected to strike and thereby caused the Carrier to incur substantial losses. Nevertheless, it is important not to overlook the fact that the striking employees have likewise suffered financially during the strike. There is no apparent reasons why they should be penalized further, since it does not ap-

pear that they were any more to blame than the railroad for the strike out of which these losses arose. As a result, having considered the argument of the Carrier, we are unable to agree that the employees' seniority can be discounted in this fashion simply because they chose to exercise their traditional prerogative to engaged in a lawful strike.

Turning to the employees now working on the railroad, the Board notes that 76 of these men were employed by FEC prior to the strike. Presumably, these employees have accumulated considerable seniority. In choosing not to support the strike, they exercised their legal rights just as the employees who refused to return to work. Hence, the Board believes that the seniority of these men should be considered on the same basis as that of the strikers in evaluating their interest in continuing to work for the company.

In contrast to the employees heretofore considered, the men who were newly hired during the strike have worked only a few weeks or months for the Carrier. It is true that many of these individuals may have taken their jobs with the hope that they might remain permanently in the employ of the railroad. Nevertheless, in view of the experience in many strikes over a long period of years, these employees must be deemed to have accepted employment subject to the risk that their services might be terminated upon the settlement of the dispute. Hence the Board is inclined to believe that the interest of the strikers in regaining their jobs outweighs any claim that these new employees may have acquired as a result of their brief period of service with the Carrier.

There may be some who will find fault with this analysis, arguing that employees must take their chances on being permanently replaced when they elect to go on strike. There is little doubt that striking employees have lost their jobs in many firms through the application of this principle. On the other hand, we are concerned in this case not with an ordinary private business but with a common carrier in an industry vital to the public. As the Supreme Court long ago observed:

> More is involved than the settlement of a private controversy without applicable consequence to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern.[5]

Experience suggests that the prospects for achieving a "peaceable settlement" of this dispute will remain in jeopardy so long as the striking employees are prevented from working by the presence of the newly hired replacements. While this situation persists, the organizations can be expected to employ every legitimate means to put pressure on the company to reinstate the strikers. Controversy of this kind may interfere with the legitimate needs of passengers and shippers and may even disrupt defense and space activities which depend on the services of the railroad. Moreover, other railroads may be tempted to follow the example of this carrier, thus provoking bitter and disruptive disputes in other sections of the country. As a result, with due regard for the public interest in a sound and viable settlement, and bearing in mind

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[5] *Virginia Railway v. Systems Federation*, 300 U.S. §15, 552.

the long service of the striking employees, we recommend that the Carrier replace the present occupants of the jobs covered by agreements between the Carrier and the organizations with striking employees to the extent necessary to permit these jobs to be filled on the basis of seniority.

In making this recommendation, we are aware that the parties may disagree as to the number of jobs required to operate the railroad. The parties, however, have not presented sufficient evidence for us to consider this question, even if we were otherwise disposed to do so. As a result, we have concluded that a determination concerning the number of positions on the railroad would involve the Board in matters that are better left to negotiation between the parties. The Board also recognizes that the organizations have not yet annulled their strike notices and that they are continuing to picket the railroad. We presume that the strike and the picketing will be terminated when the parties resolve the issue of reinstatement and the other matters of dispute between them.

B. Wage Increase

The central issue in this dispute concerns the amount of wage increase, if any, which should be paid to the employees. The Section 6 notice served upon virtually all Class I railroads, including the Florida East Coast, stated the wage proposal of the cooperating labor organizations as follows:

1. All rates of pay shall be increased by the addition to the rates existing on November 1, 1961, of twenty-five (25) cents per hour, this increase to be applied to all types of rates so as to give effect to the requested increase of twenty-five (25) cents per hour.

In their counterproposals, the railroads, including the FEC, proposed certain wage reductions for non-operating employees. Presidential Emergency Board No. 145 considered these counterproposals and recommended that they be withdrawn. In the proceedings before this Board, the Carrier did not expressly urge such wage reductions. Moreover, it claimed at the hearing that it had no intention under its Section 6 notices of September 24, 1963, to pay less than the existing rates.

In the proceedings before this Board, the organizations did not argue for the amount of wage increase originally asked in their Section 6 notice of September 1, 1961. Rather, they asked that the Florida East Coast accept and put into effect the 10.28 cents per hour increase which was agreed to nationally. In arguing for this action the organizations emphasized the importance of pattern bargaining in the railroad industry and cited the fact that this system has been developed over the years by the carriers and the labor organizations as a method for stabilizing labor relations in the industry.

The Carrier, on the other hand, expressed its unwillingness to make the increases in wages which had been agreed to nationally. It cited data purporting to show that its wages are already above the rates in the Florida labor market for comparable work. The Carrier took the further position that in any event its financial position is such that it cannot afford to make the requested increases.

(a) Railroad industry wage pattern

The record of the proceedings before the Board points up the importance of national handling in wage and rules movements in the railroad industry. Prior to the present controversy, the FEC had for many years participated in the national handling of such movements. It is also clear that the rates of pay for the positions comprehended in the various agreements between the FEC and the 11 labor organizations here involved are comparable with those obtaining on other Class I railroads prior to the national agreement of June 5, 1962.

In the course of its deliberation, Presidential Emergency Board No. 145 considered extensive data regarding changes in wages for railroad employees over the years. It also considered the appropriateness of various criteria which could be used in making a judgment regarding the amount of increase which might be recommended. The criteria enumerated by the Board were:

1. The selected industries standard.

2. The standard of comparison with wages by production workers in all manufacturing or durable goods.

3. The standard of recent wage movements in industry generally.

4. Changes in the cost of living.

5. Financial position and prospects of the industry.

The Board analyzed the data before it in terms of

these criteria. It is unnecessary for the purposes of this report to repeat the thorough analysis made by Board No. 145 of the application of the cited criteria to the wage issue before it. Suffice it to say that after analysis and deliberation the Board issued recommendations which formed the basis for the wage increase of 10.28 cents per hour which was embodied in the national settlement of June 5, 1962. As a result of this agreement a national pattern was established for the railroad industry.

A comparison between the FEC wage rates and those paid by Class I railroads generally to nonoperating employees is of basic significance here in view of the manner in which the compensation of railroad employees has been determined over the years. For many years in the railroad industry, national or pattern bargaining has been of major significance. It has been so regarded by the labor organizations who represent railroad employees, and it has been likewise recognized by the railroads. There have been many factors in the history of railroad labor relations which have led to the development of national handling of wage and rules movements. In Employees' Exhibit 6, introduced in this proceeding, there is reproduced an excerpt from testimony given by a carrier witness before Presidential Emergency Board No. 137 concerning the role of pattern bargaining in the railroad industry. In that testimony the witness gave two major factors which have led to national handling and pattern bargaining in the industry. These were:

(1) The extraordinary degree to which railway employees from different carriers and classes of employment are thrown together in their work, and (2) the unusual manner in which railroad employees are represented, resulting in intense rivalry among the different labor organizations.

In this same testimony the carrier witness emphasized the importance of pattern bargaining in the maintenance of stable and harmonious labor relations in the railroad industry. He stated:

> Pattern collective bargaining in the railroad industry has resulted from the fact that employee morale and stable and harmonious labor relations can be maintained, and endless turmoil and strife avoided, only if uniform and nondiscriminatory adjustments are made in the rates of pay and in the rules governing the compensation and working conditions of all classes and crafts of employees that are similarly situated with respect to each proposed adjustment.

It is clear, therefore, that this system of national handling has been achieved over the years as a plan to stabilize labor relations in the industry to the advantage of both the employees and the railroads.

While the Florida East Coast did not participate in the national handling of the wage and rules movement of 1961 for nonoperating employees, it is still a part of the national railway system, and it is legitimate to consider wage adjustments in the whole system in determining the amount of wage increases which should be made on the Florida East Coast. The fact that a series of increases for these classes of employees has been agreed to by the labor organizations and every other Class I railroad in the United States is a compelling reason for concluding that the same increase of 10.28 cents per hour should be granted by the Carrier here involved. In these circumstances, this Board is reluctant to recommend a departure from the 10.28 cents

per hour increase in the absence of persuasive reasons for doing so. For to do so might invite chaos and instability in employer-employee relations in the railroad industry.

(b) Area wage companies

In arguing that no wage increases were justified, the Carrier pointed out that wage rates for comparable work in other industries in Florida were substantially less than those paid by FEC. In support of this position the Carrier cited average straight-time hourly earnings of production workers in manufacturing industries in Florida, which were in general lower than the average straight-time hourly rate of $2.42 on the Florida East Coast. This comparison is of relatively little value, since no data have been submitted with respect to the kind of manufacturing industries being cited or the skill levels of the employees involved. In short, there is inadequate information to enable the Board to make a meaningful comparison.

The Carrier also cited certain data regarding the rates paid laborers in State highway maintenance work in Florida. It was alleged that these rates could be properly compared with the rates paid laborers engaged in maintenance of way work on the Florida East Coast. While there is probably some basis for this comparison in relation to the nature of the work performed by the two groups, it involves such a small segment of the Florida East Coast employees that the comparison is of very limited value to the Board.

In further support of its position that no wage increase is justified, the Carrier submitted two wage sur-

veys, one made by the Southern Bell Telephone & Telegraph Co., and the other by the National Office Management Association. In general, these data purported to show that the rates of pay for Florida East Coast nonoperating employees are higher than the rates for comparable work in various enterprises in the major cities of Florida. These exhibits do show on their face that rates for the jobs surveyed were higher on the Florida East Coast than in the other enterprises reviewed. Nevertheless, there is inadequate information available regarding job contentment and the levels of skill which would enable the Board to make meaningful comparisons.

A review of the above comparisons by the company leads to the conclusion that they are of limted value in judging the merits of the requested wage increase involved in this case. Historically, the pattern of wage rates in the railroad industry has had an integrity of its own. Comparisons between railroad wage rates and wage rates in local labor market areas have been regarded as less significant than comparisons between wage rates within the railroad industry.

A more meaningful comparison than those mentioned above could be derived from relating the rates paid by FEC to those paid by its two major competitors, the Atlantic Coast Line and the Seaboard Air Line Railroads. While the Board does not have a detailed breakdown of position rates on the Atlantic Coast Line and the Seaboard for nonoperating employees, it is clear that they have been adjusted upward by the 10.28 cents per hour agreed to nationally on June 5, 1962. Certainly the Board has not been presented with any data to

show that Florida East Coast rates for these positions were any higher than those of the Atlantic Coast line and the Seaboard at the time of the national settlement. It appears that historically the rates on these three carriers have been generally comparable, and that increases from time to time have been about the same on the three carriers. In the absence of compelling reasons, it is difficult to find justification for lower rates for these positions on the Florida East Coast. The employees work and live in the same labor market area and the duties of the respective positions are comparable.

In its Exhibit 2 the Carrier presented data purporting to show that the Florida East Coast has since 1957 paid out a relatively larger percentage of each dollar received in wages than either the Atlantic Coast Line or the Seaboard. For example, the exhibit shows that in 1959 the Florida East Coast paid out in wages 56.15 cents of each dollar received in revenue, whereas in that year the Atlantic Coast Line paid out only 47.41 cents and the Seaboard 45.50. However, the exhibit also shows that since 1959 the Florida East Coast's position in this respect has improved substantially with the result that in 1961 and 1962 its position was comparable with the other two railroads. Thus, at a time when the Florida East Coast is taking the position that it cannot afford a wage increase for the nonoperating employees, its wage costs as a percentage of each dollar in revenue compares favorably with that of the two competing roads.

Having considered the wages paid by various other employers, the Board concludes that the most relevant comparisons suggest no reason why the FEC should

not adhere to the national pattern. We turn, therefore, to the remaining contention of the Carrier that it is financially unable to pay the wage increases contained in the national agreement.

(c) Inability to pay

Another issue in this case is the Carrier's alleged inability to pay a wage increase. Where such condition erists it surely is not irrelevant to a wage determination. An employer's financial status is either an implied or explicit consideration in practically every wage decision. And it is not an alien consideration in the railroad industry or in any case where it is claimed that a wage raise will cause financial distress or possibly spell bankruptcy for a firm. Yet while its relevance is acknowledged, this Carrier's financial condition can hardly be the sole criterion. Financial hardship is one among several wage influencing factors; as has already been indicated, equally relevant factors are community and intraindustry wage comparisons and national settlement patterns. All these factors, including financial hardship, were carefully considered by Emergency Board No. 145 in making the recommendations on which the national settlement was based. The issue here, therefore, is whether the financial problems of the Carrier are sufficient to warrant a departure from the national agreement.

FEC strongly urges a present inability to pay a wage increase to its employees in any amount. It declares that to be compelled to do so would force it into bankruptcy. In the 1962 wage negotiations with the representatives of its non-operating employees, it took a less firm position. It claimed then that an unfavorable

cash position made it impossible to meet the national settlement figure of 10.28 cents an hour increase, but offered the employees what it called "a more liberal overall increase" under terms which, it urged, would enable it to "generate sufficient funds with which to pay the proposed increase."[6]

The Carrier has sought to demonstrate its inability to pay by introducing evidence bearing on its declining revenues, its present financial position, and its prospects for the future. In so contending, it draws our attention to various aspects of its operating and financial conditions which it asserts have undergone reverses since the railroad was reorganized and also since the strike began on January 23, 1963. Among them are the low rate of return on investment, increasing ratio of transportation expenses to revenues, failure to meet contingent interest payments and sinking fund requirements, a decline in operating revenues from $38,938,061 in 1957 to $29,505,302 in 1962, and an increase in its accumulated deficit from $352,876 at the end of 1962 to $1,541,429 at October 30, 1963. Also it stresses that for the past 7 years the railroad has been unable to

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[6]As stated earlier, the counteroffer, made Dec. 5, 1962, called for a 1-2/3 percent increase effective Sept. 1, 1962, a further 1-2/3 percent increase effective Mar. 1, 1963, and a third increase of 1-2/3 percent effective Sept. 1, 1963. It also specified that retroactive payment in the amount of 1-2/3 percent for work in the period from Feb. 1 to Aug. 31, 1962, would be made if the counteroffer were adopted within 1 week. A further condition was that a moratorium on changes in rates of pay would be in effect until Mar. 1, 1964.

According to Carrier Exhibit 6 the cost of the organizations' demand for the period between Feb. 1, 1962, and May 1, 1963, would have been $331,082.52, as compared to an outlay of $169,628.21 under the Carrier's proposal. However, after Sept. 1, 1963, the percentage increase under the Carrier's proposal would have been 5 percent, or 12.1 cents an hour.

meet its fixed charges out of railroad operating revenues, and adds that unless interest payments on the mortgages and sinking fund requirements are met, the Carrier will be hampered in obtaining funds for necessary improvements, expansion of the properties, or for retirement of obsolete equipment. In order to earn fixed and contingent charges alone, it states, would require either an increase in operating revenue from $29,500,000 to about $37,500,000, or else a reduction in the present ratio of expenses to revenue from 82 percent to 75 percent. While a 3-percent to 5-percent future growth in revenue can be expected, according to a carrier witness, such an amount would hardly be sufficient to meet the present company needs, in his opinion, even if no wage increase is granted.

The Carrier points to several factors to explain its declining revenues over the past several years. Of principal importance, it notes, is the loss of traffic to and from Cuba which formerly provided some $2½ million of revenue each year. And it adds that since the strike, conditions have worsened. For example, a barge line has been established to move rock from the Miami area by water. The Carrier estimates the resulting revenue loss at $650,000 a year. The Carrier states that also since the strike it has lost mail business in an amount estimated at $1,200,000 a year.

FEC has called attention to various factors which allegedly cloud its future prospects. Among these considerations, it says, the most serious is the prospective merger between Seaboard Air Line Railroad and the Atlantic Coast Line, which has recently been approv-

ed by the Interstate Commerce Commission[7] FEC officials testified that this merger could divert more than $5 million of revenue from the railroad and might even sound the "death knell" of the Florida East Coast. Apart from the merger, the railroad may lose at least $500,000 from an expected adjustment in the division proportions from through rates shared by Northern and Southern carriers.

The Carrier also anticipates a loss of $350,000 annually from relocation of industry from downtown areas to outlying areas around Miami. Further losses in the amount of $250,000 a year may result from the application by the Atlantic Coast Line to extend its lines into the fruit and vegetable producing areas in the Belle Glade area. The Carrier thus estimates it might lose some $11 million a year from the above factors.

Further, as regards general business prospects, FEC complains of increased competition from other modes of transport, principally motor, air carrier, water, and pipeline. It especially emphasizes its heavy freight revenue losses which result from a diversion of vegetables and fresh fruit products to regulated motor carrier traffic, pointing out that of all the fruit and vegetables traffic which originates in FEC territory, only 28 percent was carried by it and 72 percent moved by unregulated or exempt carriers.

There are obvious difficulties in appraising all this evidence and evaluating its bearing on the ability of

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[7] ICC Finance Docket No. 21215, decided Dec. 2, 1963 (service date Dec. 13, 1963).

the Carrier to pay the national wage rates. An adequate assessment would require separate analysis of the many facts and circumstances connected with each alleged instance of revenue loss. All of the necessary evidence for this task has not been introduced in these hearings, nor could it be in a proceeding of this kind. Moreover, any conclusions that are reached concerning the prospects of this carrier must depend in part on contingent factors, such as the effects of the merger, which are necessarily speculative in nature. Further difficulties result from the absence of detailed information relating to other railroads. Having enumerated these handicaps, the Board must still proceed to formulate the best judgment it can muster regarding the ability of this Carrier to meet the terms of the national settlement.

With regard to the Carrier's declining revenues, it must be observed that evidence of recent trends, standing alone, is not entitled to great weight. One cannot safely assume that such tendencies will continue unless the underlying causes will persist. We are not persuaded that they will. The major reason for the recent decline is undoubtedly the loss of Cuban traffic; this traffic has already disappeared and no reasons have been advanced to suggest that the resulting losses will be any larger in the future than they have been in the past. Moreover, new developments have taken place on the railroad which cast doubt on any attempt to extrapolate from the past. In particular, new management has recently taken over the company and is making a vigorous attempt to improve the railroad's position. As a result of these efforts. Railway operating revenue actually increased in 1962 over 1961, thus reversing the down-

ward trend of the past 4 years. Net railway operating income also rose in 1961 and again in 1962. Indeed, if we include the $578,738.45 earned from FEC's non-operating properties, the company appears to have suffered a deficit of only $5,225.72 in 1962 even after paying its heavy fixed charges. In view of these developments, an appraisal of the Carrier's ability to pay must depend more on its present financial position and on specific evidence as to its future prospects than on inferences drawn from trends over the past several years.

Any analysis of the company's present financial condition must recognize the fact that the railroad has been losing money. Even if we take account of income from sources other than railway operations, the Carrier has not quite succeeded in earning enough to meet its fixed and contingent charges. No interest has been paid on the second mortgage bonds and the prospects for common stock dividends are remote, to say the least. Yet we cannot overlook the fact that the plight of this carrier is shared by many other railroads which have accepted the national settlement. At least 25 Class I railroads suffered deficits in net income in 1961, and the great majority of these carriers, unlike FEC, incurred deficits in net railway operating income (before deduction for fixed charges). Moreover, a number of these railroads with lower net investment than FEC sustained significantly larger deficits.

It is true that FEC, unlike the other carriers, has experienced a long strike with a resulting deterioration of its cash position. This fact is not without significance and will be considered further in connec-

tion with the problem of retroactive pay. On the other hand, even considering the effects of the strike, it is doubtful whether the financial predicament of the Florida East Coast is any worse than that of several of the railroads which were considered by Emergency Board No. 145 and accepted its recommendations. In any case, the financial status of this carrier cannot be fully evaluated without considering its future prospects.

In describing the outlook for this carrier, FEC witness pointed to numerous problems confronting the railroad. It is worth noting, however, that the two spokesmen for the Carrier were not completely in agreement on the outlook for the railroad. Mr. T. C. Maurer, the company's Chief Freight and Passenger Traffic Officer, suggested that the prospects for increasing revenue were "very bleak." On the other hand, the Chief Finance Officer, Mr. C. D. Lane, estimated a steady growth in revenues on the order of 3—5 percent each year.

Turning to the estimates supplied by Mr. Maurer, we would observe that his testimony is subject to question on several points. For example, he predicted a loss of over $5 million in revenue each year as a result of the Atlantic Coast Line-Seaboard merger. It should be noted initially that the validity of the merger has not been finally determined and that appellate proceedings and possible action by the Justice Department may delay its consummation for several years. Of greater pertinence here, however, is the fact that the Interstate Commerce Commission reached very different conclusions from Mr. Maurer in assessing the impact of the merger on the Florida East

Coast. The Commission concluded that most of the diversion predicted by Maurer would not take place because the newly merged company would not risk retaliatory action which FEC could take by routing its originating traffic over other lines. Thus, the Commission estimated the probable diversion at only a few hundred thousand dollars. It was also pointed out that even this loss might be offset by certain conditions for FEC with routes running to Birmingham and Montgomery. In summary, the Commission concluded:

> **The opening of the Jacksonville gateway and the new reprisal routes would be particularly beneficial to East Coast in that it will assure open routing for that carrier in conjunction with the merged company. The increased reprisal power of East Coast, in our opinion, will substantially reduce and perhaps eliminate any traffic loss from the diversionary activities of the merged company.**

Several of the competitive factors emphasized by Mr. Maurer are also of doubtful relevance, either because he failed to demonstrate that the competition would be worse in the future than it had been in the past, or because he did not show that the competition bore more heavily on the Florida East Coast than on other railroads throughout the country. For example, testimony was introduced that FEC had encountered severe competition from trucks in the carriage of fruits and vegetables. Nevertheless, uncontradicted evidence from the organizations revealed that while FEC carries less than half the available produce, its share of the business has, if anything,

increased somewhat over the past 15 years. Similarly, much of the carrier's general testimony regarding the impact of trucking, air transport, and water carriers suggests only that FEC has been subject to the same sort of competition as most other railroads in the United States. Evidence concerning the effect of weather on the traffic in fruits and vegetables seems likewise immaterial in the absence of any showing that crop freezes will become more frequent in the future.

While the company has understandably emphasized the sources of potential losses in revenue, consideration must also be given to various offsetting factors which may strengthen the Carrier's position. For example, the organizations have introduced evidence to show FEC's rapid progress in the carriage of automobiles due to its "piggyback" operations. Traffic of this kind has grown since 1958 from 13 million tons to 68 million tons in 1962; revenue from this business increased from $363,000 to $1,157,000 over the same period. Of much greater significance are the gains which will be realized once materials and equipment begin to travel over the new spur linking FEC with the massive defense facilities on Cape Kennedy and Merritt Island. Mr. Maurer testified that the revenue derived from these shipments may be less than anticipated due to the unexpected use of other modes of transport. Nevertheless, the Board of Inquiry established by President Kennedy on September 24, 1963, indicated that substantial revenues would accrue to the railroad from this source. According to the Board, the Corps of Engineers estimates that 521,000 tons of construction materials will be shipped over the Florida East Coast in the next 12 months alone. In addition,

NASA estimates that 1,600 carloads of supplies will be required during the same period, quite apart from the construction material mentioned above. These demands can be expected to remain at a high level in 1965, since major construction in the Cape Kennedy area will continue through that year.

In addition to these specific examples of increased revenue, further gains should be realized through general improvements in economic conditions. Florida remains the most rapidly growing State in the Southeast area, and although Mr. Maurer tended to discount this factor, it is hard to believe that FEC will not share to some extent in the growth of business activity. Moreover, prospects for the tax cut as well as other business indicators suggest that 1964 will be a prosperous year for the national economy. Indeed responsible railroad officials have very recently predicted a continuing improvement in the economic situation of the railroads during this period.[8]

There are also several possibilities for decreasing expenditures on the Florida East Coast so as to improve its deficit position. The company has already made great strides in 1961 and 1962 in reducing its labor costs to a level comparable to its competitors. Moreover, FEC is currently engaged in litigation which could materially reduce its tax base and thereby save the company in excess of a half million dollars per year. It is also possible that savings will be achieved in personal injury claims and resulting litigation expenses which were abnormally high in

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[8]For an assessment of the situation see address by Stuart R. Saunders, reported in Wall Street Journal, Dec. 11, 1963.

1962 because of a backlog of unsettled claims and a severe accident in 1960. As the organizations have pointed out, the gains to be realized from any one of these sources would more than offset the increased cost of the national settlement. And while it is true that these savings are merely contingent, they are as relevant to this inquiry as the various contingent losses which company witnesses have emphasized.

In assessing the overall significance of the Carrier's evidence, the Board is guided by the principle that inability to pay should be clearly demonstrated in order to justify a departure from the uniform national wage rates that are so important to railroads and Unions alike. In the judgment of the Board, the evidence presented by the Carrier does not meet this standard. In the first place, the financial position of the company appears no worse, and indeed may be better, than it was during many prior years when it was willing to accept the national wage pattern. Moreover, while the company has pointed to examples of actual and prospective losses in revenue, important facets of this testimony are subject to question, and no real showing has been made that the losses will not be outweighed by gains in revenue from other sources and from continued improvements in the efficiency of operations. Finally, the company has made little effort to distinguish its predicament from that of many other railroads which accepted the national settlement in the face of financial difficulties which appear more serious than those of the Florida East Coast.

In reviewing the history of this dispute and the evidence presented by FEC, one suspects that the posi-

tion of the Carrier must be influenced not so much by its belief that it is afflicted with unique financial hardships as by its conviction that national handling does not insure sufficient consideration for the peculiar conditions and problems confronting the individual railroad. This is an old and vexing problem in the field of collective bargaining and one for which there is no universally correct solution. In considering the railroad industry, however, we are necessarily influenced by the fact that unions and carriers alike have sought to bargain on a national basis and that the weak railroads have joined with the strong in support of this principle. In taking this position, the carriers and the organizations have expressed the view that individual negotiations would promote unrest and enhance the possibility of disruptive strikes. Experienced and impartial observers have joined in this conclusion. This Board is not prepared to disturb the consensus that has been reached concerning the manner in which collective bargaining should be carried on in the railroad industry. Accordingly, the Board recommends that FEC agree to pay the 10.28-cent increase in conformance with the 1962 national agreement.

(d) Retroactivity

Under the national settlement, FEC would be obliged to pay retroactive wage increases dating back to February 1962. The amount of this obligation would approximate $250,000 for the period up to the commencement of the strike, and more would be added if retroactivity were extended to the employees who worked during the strike.

The question of retroactive pay involves somewhat different considerations than those connected with the prospective rates to be paid by the Carrier. In this case, for example, we would suppose that the striking employees, having experienced the hardships of a long strike, would be more concerned with regaining their jobs at the standard wage than in obtaining retroactive pay for the period preceding the strike. Moreover, retroactive pay involves a lump-sum obligation of rather formidable proportions. This obligation will impose a burden on a carrier which will have just emerged from a long and costly strike during a period in which other railroads have enjoyed relative prosperity. While the employes may be no more at fault than the Carrier for the strike, the fact that the company's cash position has greatly deteriorated during the past year cannot be ignored. As a result — and solely because of the special circumstances of this case — we believe that the Carrier should not be obliged to grant retroactive compensation.

It might be argued that retroactive pay could be granted without financial hardships if the company were given a period of time in which to make the payments. The Board has considered this possibility. We have already pointed out, however, that the prospects for this railroad are somewhat uncertain over the next few years. While we are not persuaded that a departure from the important principle of standard national wage rates is warranted, we cannot be confident that the Carrier will be able 1 or 2 years hence to pay a large lump sum in retroactive compensation. As a result, we recommend that the organizations refrain from seeking any retroactive pay in negotiating a settlement of this dispute.

C. Advance Notice

The organizations propose that the Carrier agree to give 5 days' notice, as provided in the national settlement, prior to abolishing jobs or effecting a reduction in force. We may presume that the Carrier opposes any notice requirement in light of the proposals which it served on the organizations on September 24, 1963. In approaching this question, the Board notes that Emergency Board No. 145 recommended a minimum of 5 days' notice after a thorough study of the problem. In the words of the Board:

> This is the type of agreement we believe gives employees reasonable advance notice. It is not the type of agreement that imposes a job freeze; nor do we believe it to be detrimental to the carriers.

Florida East Coast has not advanced any argument tending to show that such a notice requirement would be inappropriate or burdensome. Moreover, the requirement would not appear to add perceptibly to the financial difficulties of the Carrier. As a result, we recommend that the parties agree to a 5-day notice period on the terms set forth in the national settlement of June 1962.

RECOMMENDATIONS OF THE BOARD

In summary, the Board finds and recommends that the dispute committed to its investigation and report be resolved in this manner:

1. The Carrier should replace present occupants of the jobs covered by agreements with the cooperating labor organizations parties to this dispute with strik-

ing employees to the extent necessary to permit jobs on the railroad to be filled on the basis of seniority.

2. That all rates of pay existing on November 1, 1961, be increased by 10.28 cents per hour.

3. That in light of the special circumstances shown, the organizations should withdraw any claims for retroactive payment.

4. The Carrier's counterproposal of September 18, 1961, for a reduction in rates of pay of employees in various classifications and crafts, as stated in paragraph 1, 2, and 3, thereof be withdrawn.

5. That the organizations' proposal and Carrier's proposal dealing with layoffs or furloughs be withdrawn.

6. That the parties negotiate a rule requiring not less than five (5) working days' advance notice to regularly assigned employees (not including casual employees or employees who are substituting for regularly assigned employees) whose positions are to be abolished before reductions in force are to be made, except as provided in Article VI of the Agreement of August 21, 1954. Any rules presently in effect more favorable to the employees should be continued.

Respectfully submitted.

HARRY H. PLATT, *Chairman*
DEREK BOX, *Member*
PAUL N. GUTHRIE, *Member.*

WASHINGTON, D. C., *December 23, 1963.*

APPENDIX A-1

EXECUTIVE ORDER NO. 11127

WHEREAS a dispute exists between the Florida East Coast Railway Company, a carrier, and certain of its employees represented by the Eleven Cooperating Railway Labor Organizations, designated in List A attached hereto and made a part hereof; and

WHEREAS this dispute has not heretofore been adjusted under the provisions of the Railway Labor Act, as amended; and

WHEREAS this dispute, in the judgment of the National Mediation Board, threatens substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation service:

NOW, THEREFORE, by virtue of the authority vested in me by Section 10 of the Railway Labor Act, as amended (45 U.S.C. 160), I hereby create a board of three members, to be appointed by me, to investigate this dispute. No member of the Board shall be pecuniarily or otherwise interested in any organization of railroad employees or any carrier.

The Board shall report its findings to the President with respect to this dispute within 30 days from the date of this order.

As provided by Section 10 of the Railway Labor Act, as amended, from this date and for thirty days after the Board has made its report to the Presi-

dent, no change, except by agreement, shall be made by the Florida East Coast Railway Company, or by its employees, in the conditions out of which the dispute arose.

JOHN F. KENNEDY.

THE WHITE HOUSE, *November 9, 1963*

LIST A

International Association of Machinists
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
Sheet Metal Workers' International Association
International Brotherhood of Electrical Workers
Brotherhood of Railway Carmen of America
International Brotherhood of Firemen and Oilers
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees
Brotherhood of Maintenance of Way Employes
The Order of Railroad Telegraphers
Brotherhood of Railroad Signalmen
Hotel & Restaurant Employees & Bartenders' International Union

APPENDIX A-2

APPEARANCES

On Behalf of Florida East Coast Railway

William B. Devaney, attorney, Steptoe & Johnson.
Edward Ball, chairman of the board, Florida East Coast Railway.
William B. Thompson, Jr., president, Florida East Coast Railway.
C. D. Lane, Jr., vice president and chief finance and accounting officer, Florida East Coast Railway.
Winfred L. Thornton, vice president and chief operating officer, Florida East Coast Railway.
Raymond W. Wyckoff, assistant vice president and director of personnel, Florida East Coast Railway.
T. C. Maurer, vice president and chief freight and passenger traffic officer, Florida East Coast Railway.

On Behalf of the Employes

Lester P. Schoene, general counsel, Employes' National Conference Committee, 11 Cooperating Railway Labor Organizations.
Eli Oliver, W. M. Homer, economists, Labor Bureau of Middle West.
G. E. Leighty, chairman, Employes' National Conference Committee, 11 Cooperating Railway Labor Organizations.
Michael Fox, president, Railway Employes' Department, AFL-CIO.
Joseph W. Ramsey, general vice president, International Association of Machinists.
Russell K. Berg, international president; Edward H.

Wolfe, vice president, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers.

J. W. O'Brien, general vice president, Sheet Metal Workers' International Association.

Thomas Ramsey, international vice president, International Brotherhood of Electrical Workers.

A. J. Bernhardt, general president, Brotherhood Railway Carmen of America.

Anthony Matz, president, International Brotherhood of Firemen, Oilers, Helpers, Roundhouse & Railway Shop Laborers.

C. L. Dennis, grand President; J. D. Bearden, vice grand president, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

O. C. Jones, vice president, The Order of Railroad Telegraphers.

H. C. Crotty, president, Brotherhood of Maintenance of Way Employes.

Jesse Clark, president, Brotherhood of Railroad Signalmen.

T. H. Gregg, vice president, Brotherhood of Railroad Signalmen.

Richard W. Smith, vice president, Hotel and Restaurant Employes and Bartenders' International Union.

APPENDIX A-3

NOTICE

September 1, 1961.

R. W. WYCKOFF,
Asst. Vice President and Director of Personnel,
Florida East Coast Railway,
St. Augustine, Florida.

DEAR SIR: Please consider this letter as the usual and customary thirty-day notice under the Railway Labor Act, as amended, of our desire to revise and supplement all existing agreements, effective November 1, 1961, as follows:

1. All rates of pay shall be increased by the addition to the rates existing on November 1, 1961, of twenty-five (25) cents per hour, this increase to be applied to all types of rates so as to give effect to the requested increase twenty-five (25) cents per hour.

2. Revise and supplement existing agreements so as to include therein rules requiring that:

Prior to any reduction in force or any abolition of a position or positions resulting in reduction in the number of employes in any seniority district or other unit covered by a seniority roster, all employes who may be affected by such reduction in force or abolition of position *will be given not less than six months' advance notice thereof.* However, this rule shall not operate to require more than sixteen hours such advance notice to each employe who may be affected under emergency

conditions such as flood, snow storm, hurricane, earthquake, fire or strike, provided the carrier's operations are suspended in whole or in part and provided further that because of such emergency the work which would be performed by the incumbents of the positions to be abolished or the work which would be performed by the employes involved in the force reductions no longer exists or cannot be performed. Whenever forces are reduced or positions are abolished with less than six months' advance notice pursuant to the preceding sentence all employes affected thereby shall be recalled to service as soon as the suspension of the carrier's operations has ceased or the work of the employes affected can again be performed, and any notice of force reduction or abolition of position pursuant to the preceding sentence shall state that employes affected will be so recalled to service. Any rule, agreement or understanding now in effect more favorable to the employe is preserved and undisturbed by this rule.

It is our desire that conferences on this notice be held at the earliest practicable date and in any event prior to the expiration of thirty days from the date of this notice, and that you, within ten days after receipt of this notice, suggest a date, time and place for this conference. In the event that we are unable to reach an agreement upon the foregoing request at such separate system conferences, we further propose that the matter be handled on a joint national basis.

In accordance with established procedure which has been followed for more than twenty years —— on the assumption that an agreement may not be reached

in separate system conferences, our organization has joined with other organizations serving a similar notice upon you and other carrier managements, in the creation of an Employes' National Conference Committee, composed of the Chief Executives of the Cooperating Railway Labor Organizations.

In the event an agreement is not reached in our separate system conferences, we request that you join with other carrier managements who are receiving a similar notice, in the creation of a Carriers' National Conference Committee, to negotiate to a conclusion in accordance with the procedures of the Railway Labor Act, the subject matter of this notice.

This request is in addition to any other requests we have submitted to you and which are now pending.

Very truly yours,

G. E. LEIGHTY,
Chairman, Eleven Cooperative Railway Labor Organizations.

APPENDIX A-4

COUNTERPROPOSALS OF THE RAILWAYS

ATTACHMENT A

Effective November 1, 1961

1. Establish new rates of pay, applicable to all employees in the following classifications and employees doing similar work, which shall in each instance be **not more than 80% of the respective existing rates:**

Clerical and Station Employees:

Typists
Telephone switchboard operators
Office assistants
Messengers and office boys
Elevator operators
Office attendants
Watchmen
Motor vehicle and motor car operators
Janitors and cleaners
Baggage, parcel room and station attendants
Callers, loaders, scalers, sealers and perishable-freight inspectors
Truckers (stations, warehouses and platforms)
Laborers (coal and ore docks, and grain elevators)
Common laborers (stations, warehouses, platforms, and grain elevators)

Maintenance of Way Employees:

Maintenance of way and structures helpers
Maintenance of way and structures apprentices
Portable steam equipment operator helpers
Pumping equipment operators
Extra gang men
Sectionmen
Maintenance of way laborers, gardeners and farmers
Bridge operators and helpers
Crossing and bridge flagmen and gatemen
Camp cooks

Shop Crafts:

Skilled trades helpers
Helper apprentices
Regular apprentices
Coach cleaners

Stationary Engine and Boilerroom Employees and Shop and Roundhouse Laborers, etc.:

Classified laborers
General laborers
Stationary firemen
Oilers
Coal passers
Water tenders

Signalmen:

Assistant signalmen
Assistant signal maintainers
Signalman helpers
Signal maintainers helpers

Dining Car Employees: Kitchen helpers

2. Establish a rule, or amend existing rules, to provide that the entering rates of pay in the following and similar classifications shall be 80% of the established rates with increases of 4% of the established rate effective on completion of the first and each succeeding year of compensated service in such classifications until the established rate is reached:

Clerical and Station Employees:
Clerks
Mechanical device operators
Stenographers

Telegraphers:
Clerk-telegraphers
Clerk-telephoners
Telegraphers
Telephoners

3. Establish a rate of $1.25 per hour applicable to all dining car waiters and other employes serving food or drinks.

4. All rates of pay not affected by Section 1, 2 or 3 shall remain unchanged.

5. Eliminate all rules, regulations, interpretations or practices, however established, which require that more than 24 hours advance notice be given before positions are abolished or forces are reduced.

APPENDIX A-5

MEMORANDUM

To: Honorable W. Willard Wirts,
Secretary of Labor.
Honorable Robert S. McNamara,
Secretary of Defense.
Honorable James E. Webb,
Administrator, National Aeronautics and Space Administration.

The prolonged labor dispute between the Florida East Coast Railway Company and its non-operating employees, which began January 23, 1963, has been a matter of increasing concern to me because of its current and potential impact upon vital defense and space programs.

I, therefore, request that you designate a representative of your Department to serve on a Federal Inquiry Board under the chairmanship of the Department of Labor.

The Board shall investigate the current and potential impact of this labor dispute on the Nation's defense and space efforts.

I expect the Board to report to me through the Secretary of Labor within ten days, stating its findings together with any appropriate recommendations.

JOHN F. KENNEDY.

September 24, 1963.

APPENDIX A-6

U. S. Department of Labor,
Washington 25, D.C.

The President,
The White House,
Washington 25, D. C.

DEAR MR. PRESIDENT: Enclosed is the report of the Federal Inquiry Board which you established on September 24, 1963 to investigate the current and potential impact of the labor dispute between the Florida East Coast Railway Company and its non-operating employees on the Nation's defense and space efforts.

The Board has concluded that this labor dispute is currently and potentially detrimental to our Nation's defense and space efforts and should be settled as expeditiously as possible. It has recommended that the parties promptly resume negotiations in an effort to resolve their differences and, in the event negotiations are not successful, that they give serious reconsideration to my recommendations of May 13, 1963, that the dispute be submitted to final and binding arbitration. To avoid intolerable interruptions in vital construction programs at Cape Canaveral and Merritt Island, the Board recommends that, until the dispute is resolved, an embargo be placed on all goods shipped under government bills of lading via the Florida East Coast Railway to these facilities, and that after the railroad spur now being constructed at these locations is completed, the Florida East Coast not be permitted to operate on that portion of the spur constructed by the U.S. Corps of Engineers.

I am in full accord with the recommendations of the Board.

I would strongly urge that the parties recognize the critical impact of this dispute on our defense and space programs as well as upon the economy of the region served by the railroad and now engage in meaningful collective bargaining.

Pursuant to your request, this Board only assessed the impact of this dispute on our defense and space efforts. However, the broad impact of the strike upon the economy of the region was made quite apparent to the Board. Since this dispute began the Federal Government has been requested by the Governor of Florida, the Florida delegation to the U.S. Congress, the Florida Public Utilities Commission, and other affected parties to take such action as may be required to bring about a resolution of this controversy.

Hopefully, the dispute will now be resolved by the parties without the need for further Government action. Such a solution would be in the best interests of all concerned. In view of the prolonged and increasingly critical nature of this controversy, I will keep you fully apprised of the responses of the parties and will make further suggestions for Government action, including the possible establishment of an Emergency Board pursuant to Section 10 of the Railway Labor Act, in the event that developments appear to warrant such measures.

Respectfully yours,

W. WILLARD WIRTZ, *Secretary of Labor*

APPENDIX A-7

THE WHITE HOUSE,
October 14, 1963.

DEAR MR. SECRETARY: I have reviewed the report of the Federal Inquiry Board on the Florida East Coast Railway dispute. The report reaffirms my concern over the impact of this dispute on our defense and space programs. It is in the public interest that this dispute be promptly resolved.

Accordingly, I am requesting the National Mediation Board to immediately contact the parties with a view to the prompt resumption of negotiations. If these bargaining efforts prove unproductive, I urge the parties to give serious consideration to your recommendation to submit their issues to final and binding arbitration.

In addition, I request that you keep me informed of all subsequent developments with regard to this dispute in the event that additional actions are required.

Sincerely,

J. F. KENNEDY.

Honorable W. Willard Wirtz,
Secretary of Labor,
Washington, D.C.

APPENDIX A-8

National Mediation Board,
Washington (25) 20572, December 11, 1963

EMERGENCY BOARD NO. 157

FLORIDA EAST COAST RAILWAY CO. AND ELEVEN COOP. RWY. LABOR ORGS.

MR. HARRY H. PLATT,
Chairman, Em. Bd. No. 157,
2080 Penobscot Building,
Detroit 26, Michigan.

DR. PAUL N. GUTHRIE,
Member, Em. Bd. No. 157,
University of North Carolina,
Chapel Hill, North Carolina.

Professor DERRICK BOX,
School of Law, University of California,
Los Angeles, California.

GENTLEMEN: Reference is made to Emergency Board No. 157, Florida East Coast Railway Company and certain of their employees represented by the Eleven Cooperating Labor Organizations, and to the stipulation made between the parties, as shown on the record, agreeing to an extension of time for the emergency board to file its report and recommendations to the President.

We are enclosing copy of letter dated December 5, 1963, addressed to Chairman Francis A. O'Neill, Jr.,

National Mediation Board, from Mr. Ralph A. Dungan, Special Assistant to the President, wherein he states that the President has approved the recommendations of the National Mediation Board for an extension of time permitting such Emergency Board No. 157, created by Executive Order No. 11127, dated November 9, 1963, to file its report and recommendations not later than December 19, 1963.

Very truly yours,

E. C. THOMPSON, Executive Secretary.

(Enclosure)

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APPENDIX A-9

THE WHITE HOUSE,
Washington, December 18, 1963.

E.B. 157

DEAR MR. CHAIRMAN: This is to inform you that the President approves the recommendation of the National Mediation Board for an additional extension of time permitting Emergency Board No. 157, created by Executive Order No. 11127, of November 9, 1963, to file its report and recommendations not later than December 24, 1963, inclusive.

Sincerely,

RALPH A. DUNGAN,
Special Assistant to the President.

Honorable Francis A. O'Neill, Jr.
Chairman
National Mediation Board
Washington, D.C.

EXHIBIT 18

FEDERATED COUNCIL
ASSOCIATION OF RAILWAY TRAINMEN
AND LOCOMOTIVE FIREMEN
INTERNATIONAL ASSOCIATION
OF RAILWAY EMPLOYEES

P. O. Box 1095 . Albany, Ga.

OFFICERS:

John W. Whitaker.
President
P. O. Box 1095
Albany, Ga.

J. F. Little
Vice-President
984 Albert Avenue
Norfolk 13, Va.

William Henderson
1st Vice-President
618 Jones St.
Waycross, Ga.

J. E. Henderson
3rd Vice-President
P. O. Box 196
Gibsland, La.

Charles Stewart
Treasurer
306 S. Front St.
DeQuincy, La.

H. R. Barnett
Auditor
1100 N. W. University
Knoxville, Tenn.

EXECUTIVE BOARD:
Herman Simpson.
Chairman
3559 Ruth St.
Houston 4, Texas
Manuel Henry
2108 Wichita St.
Houston 4, Texas
Manuel Henry
2108 Wichita St.
Houston 4, Texas
Fred Davis
1519 Tuttle Ave.
Montgomery, Ala.
T. Jordan
1819 Milan St.
Shreveport, La.
V. E. Harrison
417 W. 16th St.
Jacksonville 6, Fla.
Robert M. Noble
1207 E. 22nd St.
Kansas City, Mo.
Miles Jackson
421 4th Terrace N.
Birmingham, Ala.
W. L. Lewis
17 Mimosa Crescent
Hampton, Va.
F. O. Jackson
210 E. Simon Terrace N. W.
Atlanta 18, Ga.

December 23, 1963

Mr. E. C. Thompson, Secretary
National Mediation Board
Washington, D. C.

Dear Sir:

A dispute has arisen between the International Association of Railway Employees and the Florida East Coast Railway Company and has not been adjusted between them and the services of the National Mediation Board under Section 5, First, of the Railway Labor Act, are hereby involved on the question as follow:

> "Carrier's Section 6 notice dated September 24, 1963 to supersede on October 25, 1963 all working agreements with one of its own which

would eliminate the craft of locomotive firemen and would transfer them from the operating department to the non-operating department as maintenance of equipment helpers in its railway shops."

There are approximately two hundred (200) employees involved.

There is an agreement in effect governing rates of pay, rules and working conditions for locomotive firemen and the Florida East Coast Railway Company represented by the International Association of Railway Employees, dated November 16, 1946.

This dispute involves not only a change in the above mentioned dispute, but a complete cancellation of it and a copy of the thirty-day notice dated September 24, 1963 is being mailed along with a copy of the new proposed agreement under separate cover.

Initial conference was held on October 18th and was recessed until December 6th and was postponed at management's request until December 18, 1963, at which time carrier unilaterally terminated conference. Copy of this letter is also being mailed under separate cover.

SIGNED AT Albany, Georgia THIS 23rd DAY OF December, 1963.

(Signed) JOHN W. WHITAKER
John W. Whitaker, President
International Association of
Railway Employees

Received: Dec. 26, 1963

EXHIBIT 19

December 26, 1963

Mr. R. W. Wyckoff
Asst. Vice President & Director of Personnel
Florida East Coast Railway Company
St. Augustine, Florida

Dear Mr. Wyckoff:

The Board is in receipt of an application for mediation from the International Association of Railway Employees covering a dispute between that organization and the Florida East Coast Railway Company on the following subject:

> "Carrier's Section 6 notice dated September 24, 1963 to supersede on October 25, 1963 all present agreements covering wages and working agreements with one of its own which would eliminate the craft of locomotive firemen and would transfer them from the operating department to the non-operating department as maintenance of equipment helpers in its railway shops."

Attached for your information is a copy of a letter addressed to the Board dated December 23, 1963 from Mr. Whitaker.

Please furnish us promptly with any statement you may care to make on behalf of the company.

Very truly yours,

E. C. Thompson
Executive Secretary

-attachment-
cc-to: Mr. John W. Whitaker
6-sad

EXHIBIT 20

FLORIDA EAST COAST RAILWAY COMPANY

St. Augustine, Florida
December 31, 1963
2

Mr. E. C. Thompson, Executive Secretary
National Mediation Board
Washington, D. C.

Dear Sir:

I have your letter of December 26, 1963 advising that the National Mediation Board is in receipt of an application for mediation from the International Association of Railway Employees covering a dispute between that Organization and the Florida East Coast Railway Company involving the Railway's Section 6 Notice of September 24, 1963 to revise the Working

Agreement in effect between the Railway and the International Association of Railway Employees and inviting a statement on behalf of the Railway.

On September 24, 1963 the Railway served Notice, pursuant to the provisions of Section 6 of the Railway Labor Act, on General Chairman V. E. Harrison of the International Association of Railway Employees, representing Locomotive Firemen of the Florida East Coast Railway Company, of desire to revise, effective October 25, 1963, the scheduled Working Agreement between the Railway and the International Association of Railway Employees to the extent indicated in the Agreement attached to that Notice. Copy of letter of September 24, 1963 with the proposed Agreement attached is appended hereto as Exhibit "A".

The initial conference was held on this Notice on October 18, 1963 at which time representatives of the International Association of Railway Employees, together with representatives of other Organizations in attendance, refused to negotiate on the matter for the reason, as expressed by General Chairman W. F. Howard who acted as spokesman for those present, that a court reporter was present to make a record of the proceedings. On October 22, 1963, however, Federated President John W. Whitaker of the International Association of Railway Employees made written request that further conferences be held on the Notice, suggesting the date of November 1, 1963. Prior commitments prevented a meeting on that date, but the date of November 8, 1963 was agreed upon and further conference on the issues involved was held on that date and again on December 18, 1963. Those conference discussions failed to resolve the dispute

and under date of December 19, 1963 I addressed the following communication to General Chairman Harrison of the International Association of Railway Employees:

"At our conference on Wednesday, December 18, 1963, we again discussed the rules changes proposed in Notice which was served on you September 24, 1963 of desire to revise, effective October 25, 1963, the Agreement with your Organization.

During the course of our discussion you rejected, in whole or in part, Articles I, II, VI, VII, IX, XI, XII, XVII, XVIII, XIX, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX and XXX of the Railway's proposed Agreement submitting certain counterproposals to those agreement provisions. The counterproposals which you submitted are not acceptable to the Railway and are therefore rejected. In view of our inability to dispose of the issues involved conferences on the subject have been terminated."

In accordance with my advice to General Chairman Harrison, conferences on the issues involved have been terminated as of December 19, 1963.

Yours very truly,

(Signed) R. W. WYCKOFF
Assistant Vice President and
Director of Personnel

RWW/p

Received: Jan. 6, 1964

EXHIBIT 21

January 6, 1964
Case No. A-7093

Mr. R. W. Wyckoff
Asst. Vice President & Director of Personnel
Florida East Coast Railway Company
St. Augustine, Florida

Mr. John W. Whitaker, President
International Association of Railway Employees
P. O. Box 1095
Albany, Georgia

Gentlemen:

References is made to application for the mediation services of this Board, in a dispute between your respective carrier and organization, described as follows:

> "Carrier's Section 6 notice dated September 24, 1963 to supersede on October 26, 1963 all present agreements covering wages and working agreements with one of its own which would eliminate the craft of locomotive firemen and would transfer them from the operating department as maintenance of equipment helpers in its railway shop."

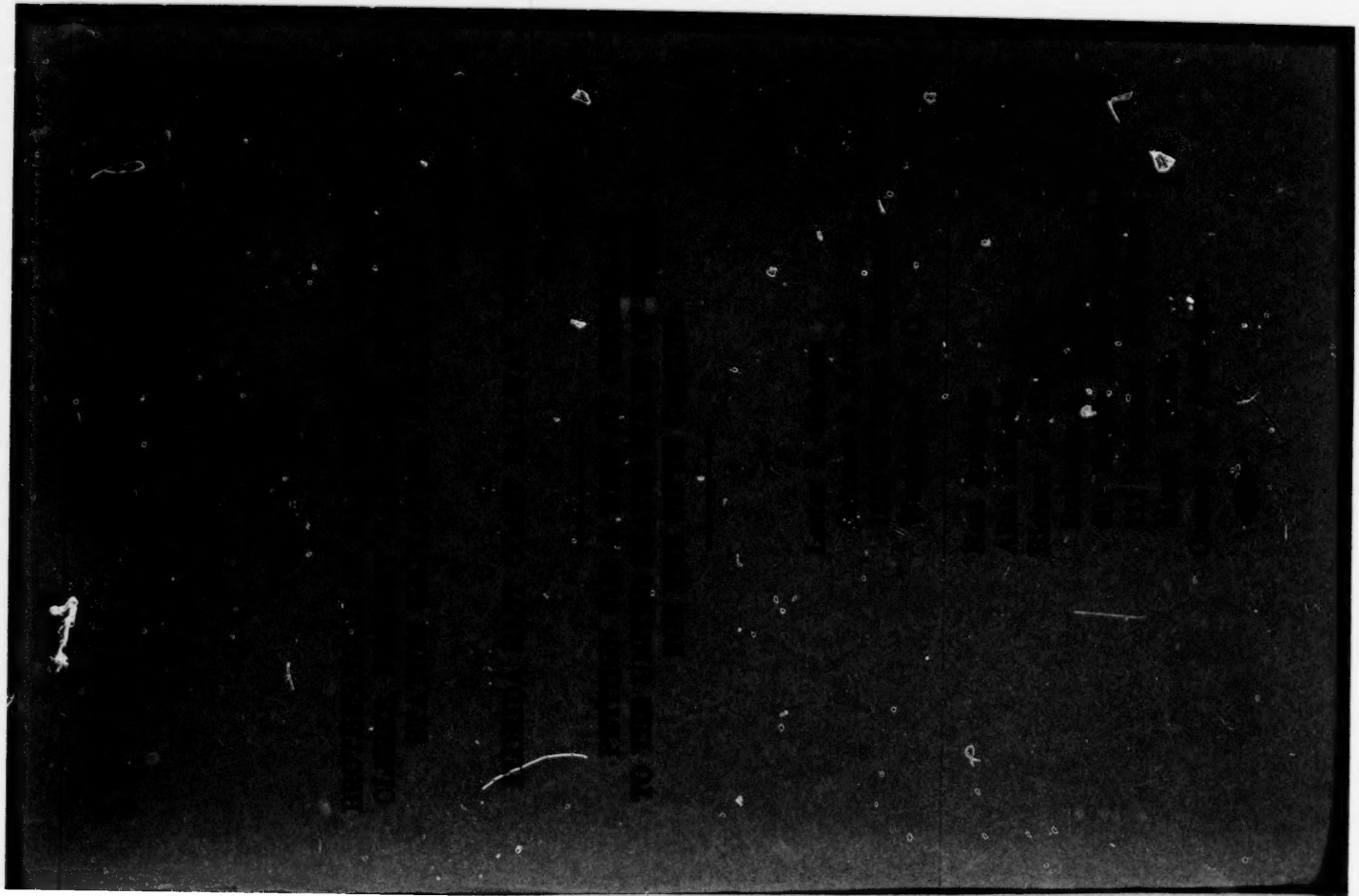
This application has been docketed as our Case No. A-7093 and will hereafter be referred to by that num-

ber. A mediator will be assigned to mediate this dispute consistent with prior commitments.

Very truly yours,

E. C. Thompson
Executive Secretary

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. _____

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, et al.

Petitioners

vs.

FLORIDA EAST COAST RAILWAY COMPANY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Ap-

[1]Petitioners, who were intervenors in the District Court and appellees in the Court of Appeals, are:

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO; International Association of Machinists, AFL-CIO; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO; Sheet Metal Workers' International Association, AFL-CIO; International Brotherhood of Electrical Workers, AFL-CIO; Brotherhood of Railway Carmen of America, AFL-CIO; International Brotherhood of Firemen and Oilers, AFL-CIO; Brotherhood of Maintenance of Way Employees, AFL-CIO; The Order of Railroad Telegraphers, AFL-CIO; Brotherhood of Railroad Signalmen, AFL-CIO, and Hotel & Restaurant Employees & Bartenders' International Union, AFL-CIO.

peals for the Fifth Circuit entered in this cause on July 21, 1965.

Citation to Opinions Below

The opinion of the Court of Appeals dated July 21, 1965, is printed in Appendix A hereto, **infra**, and is reported at 348 F.2d 682 under the style of **Florida East Coast Railway Co. vs. United States.** The Findings of Fact and Conclusions of Law of the United States District Court for the Middle District of Florida are printed in the Record, Volume I at pp. 180-189, and the Preliminary Injunction which was appealed by respondent to the Court of Appeals appears in Volume I, pp. 189,191, of the Record. A certified copy of the Record plus nine copies of the Record as printed for use of the court below have previously been filed with this Court by the United States as petitioner in the companion case, **United States vs. Florida East Coast Railway Co.**, No. _____, October Term, 1965, arising out of this same litigation.

Jurisdiction

The judgment of the Court of Appeals was entered on July 21, 1965, and is printed in Appendix B hereto, **infra.** Mr. Justice Black, by Order dated October 15, 1965, extended the time to file a petition for writ of certiorari to and including November 18, 1965.[2] The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[2]Upon application of the United States as petitioner, Mr. Justice Black on October 15, 1965, entered an Order Extending Time to File Petition For Writ of Certiorari to November 18, 1965. Thereafter the Florida East Coast Railway Co. applied on October 26, 1965, for "a modification of the extension of time previously granted so as to include all parties to the cause." This application was renewed on November 2; authorities were submitted in support thereof on November 5; and thereafter Mr. Justice Black endorsed on the application, "Motion granted if within my power to do so."

Questions Presented

1. May a Federal District Court aid a carrier faced with a legal strike, by relieving the carrier from its duty to comply fully with the Railway Labor Act in order to effectuate the carrier's "right to continue to run its railroad under the strike conditions"?

2. Did not the Court of Appeals rule in conflict with a decision of this Court, **Brotherhood of Railroad Trainmen vs. Toledo, P. & W. R.R.** (1944), 321 U.S. 50, by holding that affirmative federal equitable relief may be granted to a railroad involved in a legal strike even though the railroad has repeatedly rejected voluntary arbitration of the strike issues?

Statutes Involved

1. **The Railway Labor Act**, 45 U.S.C. 151-163. The applicable texts of Section 2, First (45 U.S.C. 152, First); Section 2, Seventh (45 U.S.C. 152, Seventh); Section 2, Tenth (45 U.S.C. 152, Tenth); Section 5, First (45 U.S.C. 155, First); Section 5, Third (e) (45 U.S.C. 155, Third (e)); Section 6 (45 U.S.C. 156); and Section 10 (45 U.S.C. 160) of the Railway Labor Act, being lengthy, are set forth in Appendix C hereto, **infra.** The provisions of Section 2, Seventh, and Section 6 are also set forth herein as follows:

Section 2, Seventh, Railway Labor Act, 45 U.S.C. 152, Seventh:

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 6, Railway Labor Act, 45 U.S.C. 156:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197."

Statement of The Case

This case involves the longest strike in the history of the American railroad industry. The dispute is a stubborn, bitter one which has resisted all efforts of the federal government (or anyone else) to resolve. Economic and other consequences on the State of Florida and on the lives of all persons affected are awesome, tragic, and incalculable. A brief history of the dispute is necessary to place the proceedings in the courts below in context.[3]

In September, 1961, petitioners, eleven railroad brotherhoods representing non-operating employees, served notices upon all Class I railroads, seeking an increase in wages and a provision for six months advance notice of layoffs. After collective bargaining and mediation proved unsuccessful, Presidential Emergency Board Number 145 was created in 1962, and a national agreement was arranged which was accepted by every Class I railroad except the Florida East Coast Railway Company.[4]

After further mediation between petitioners and the FEC proved unsuccessful, the National Mediation Board requested both parties to submit their differences to arbitration. Both the FEC and the petitioners refused this first request.

On January 23, 1963, the non-operating employees of the FEC began their legal strike. Picket lines were es-

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[3]A more detailed history of the dispute may be found in the report of Emergency Board Number 157, dated December 23, 1963, which is contained in the printed record, Exhibit Volume I, pages 451-490.

[4]Hereinafter referred to as the FEC.

tablished which were honored by most of FEC's non-striking operating employees, and the FEC temporarily ceased operations. Eleven days after the strike began the FEC resumed operations. At first the FEC used only supervisory personnel. Gradually, however, it was able to recruit a work-force of replacements and returning employees.

On October 1, 1963, the FEC's then vice-president Thornton (now its president) testified before a joint Federal Inquiry Board that, "We have as of this time, in excess of 650 employees on the railroad whom we had recruited or who have actually returned to work since the work stoppage." He added, "I think we are approaching the point now where we are almost up to full manpower requirements." At that time FEC was handling approximately 95% of the car-load freight traffic handled in comparable pre-strike periods, but was still not accepting less-than-carload shipments or passenger traffic. (Record, Volume I, pp. 362, 364, 365, 387, 388)

The employees who returned to work, or who were recruited, were not employed, however, under rates of pay, rules, or working conditions as embodied in existing contracts. Instead, the replacements and the returning employees were required to agree individually to work on terms, unilaterally prescribed by the FEC, which differed radically from the existing contracts. These terms were codified by the FEC on September 1, 1963, in a document entitled "Conditions of Employment" for which each employee was required to sign a receipt and which were stated to apply for the duration of the strike. Suffice it to say that the "Conditions of Employment" reduced pay, increased hours, and radically favored the employer.

On September 24, 1963, the FEC embodied the "Conditions of Employment" in a Section 6 Notice which it served upon petitioners, and since that time the parties have engaged in "bargaining" as to whether the FEC should do what it had already done in fact since February 3, 1963.

Meanwhile, as the strike continued, Secretary of Labor Wirtz on April 3, 1963, and again on May 17, 1963, had requested that the parties agree to resolve their differences through arbitration. This time the striking unions agreed to arbitration but the FEC persisted in its refusal to arbitrate (Exh. Vol. I, 458-459). Again in October, 1963, the National Mediation Board proferred arbitration which the unions accepted but the FEC declined (Exh. Vol. I, 461).

This suit was filed on April 30, 1964, by the United States against the FEC seeking injunctive relief to enforce the provisions of Sections 2 and 6 of the Railway Labor Act. These union petitioners sought, and were granted, leave to intervene as additional plaintiffs. Hearings were held before the District Court on May 26, 27, and 28, 1964, but a decision was delayed pending the decision of the Court of Appeals for the Fifth Circuit in **Florida East Coast Railway Company vs. Brotherhood of Railroad Trainmen,** 336 F.2d 172. That decision was rendered on August 18, 1964, and thereafter an injunction was entered in this case on October 30, 1964. The injunction restrained the FEC from operating under the individual agreements entitled "Conditions of Employment" and required the FEC to abide by its duly negotiated agreements and further restrained the FEC from

"(e) making any other changes in rates of pay, rules or working conditions of its employees in crafts or classes covered by existing collective bargaining agreements except in accordance with the procedures of the Railway Labor Act or *except upon specific authorization of this Court upon a finding of reasonable necessity therefor upon application of the FEC to this Court during the pendency of the current strike.*" (emphasis supplied) Record, Volume I, p. 190, 191.

On November 12, 1964, the FEC filed its application for approval of certain deviations from the duly negotiated collective bargaining agreements, which deviations it contended were "reasonably necessary" for it to continue to operate during the strike. After hearings, the District Court granted permission to the FEC to deviate from the duly negotiated collective bargaining agreements in certain enumerated respects (Record, Volume I, pp. 223-225).

Both the FEC and the United States appealed to the Court of Appeals for the Fifth Circuit. That Court rendered its opinion and judgment, here sought to be reviewed, on July 21, 1965. That decision affirmed the District Court and reiterated the doctrine, first created in **Florida East Coast Railway vs. Brotherhood of Railroad Trainmen,** 336 F.2d 172, certiorari denied, 379 U.S. 990,[5] that a district court may upon proper evidentiary showing, permit a carrier to deviate from Section 2, Seventh,

[5]In opposition to that petition for certiorari, FEC argued that no "reasonably necessary" exceptions had yet been granted to FEC in regard to petitioner BRT, and that the issue was therefore hypothetical or moot. Such is clearly not the case here.

of the Railway Labor Act (45 U.S.C. 152, Seventh) and unilaterally alter existing rules, rates of pay, and working conditions where reasonably necessary to aid the carrier to operate during a legal strike.

Argument and Reasons For Allowance Of The Writ

Petitioners rely upon the following reasons why the petition for writ of certiorari should be granted in this case:

1. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

Ever since the 1870's Congress has been vitally concerned with the matter of labor disputes in the Nation's railroad industry. Recognizing the dire consequences that the public as well as the parties suffer when labor-management relations break down in this key area of our economy, Congress has repeatedly struggled with the problem of providing a fair method of settling such disputes consistent with freedom and our traditions. Perhaps no other subject has come before the Congress so repeatedly and so persistently over so long a period. Public Law 88-108, approved August 28, 1963, is the latest example. The first legislation, providing for voluntary arbitration and public investigations, was passed in 1888. 25 Stat. 501. Between those dates, Congress applied its attention to the problem repeatedly—in the Erdman Act of 1898, 30 Stat. 424; the Newlands Act of 1913, 38 Stat. 103; Title III of the Transportation Act of 1920, 41 Stat. 469; and

then the Railway Labor Act of 1926, 44 Stat. 577, thereafter amended in 1934, 48 Stat. 1186, in 1948, 62 Stat. 909, and in 1951, 64 Stat. 1238. Hardly a decade has elapsed without the need for Congressional attention. Clearly the problem itself is one of paramount national importance.

In this litigation, involving the longest strike in railroad history, the Court of Appeals for the Fifth Circuit has judicially created a major exception to the clear, plain, mandatory provisions of the Railway Labor Act. It has done this without reference to either the language of the statute itself or to its extensive legislative history so ably presented to it in the Government's brief. No other court of appeals, or state or lower court for that matter, has discovered this exception during the 39 years the Railway Labor Act has been on the books. Petitioners respectfully submit that review by this Court is essential in order to preserve the integrity of the Act and to insure that the Congressional purposes embodied in the Act are achieved. Even if it is determined that the exception so lately enunciated does in fact exist, review by this Court is necessary in order to define it more clearly and settle how it shall be uniformly administered by courts throughout the Nation.

The Court of Appeals held in this case that a railroad, when faced with strike conditions, may apply to a U. S. district court for leave to change rates of pay, rules, and working conditions of crafts, both striking and non-striking, despite the specific prohibitions of the Railway Labor Act which are enforceable by both civil and criminal sanctions. In short, the Court of Appeals held that the District Court is empowered to license a railroad to ignore

the statute where the railroad makes a sufficient showing that exemption from the Act is "reasonably necessary" for it to operate under strike conditions.

Apparently it is not just the U. S. District Court for the Middle District of Florida which enjoys this power to authorize exemption from the Railway Labor Act. District court judges throughout the country, as well as all judges of state courts of general jurisdiction, presumably may exercise their discretion from "the locomotive cab" (348 F.2d at p. 686) to decide whether it is reasonably necessary for the carrier to be relieved of its Railway Labor Act duties in order "to effectuate its right to continue to run its railroad under the strike conditions." (348 F.2d at 686.) It is neither idle nor speculative to suggest that the mere threat of strike action on any railroad system in the Nation will produce the greatest court-shopping expedition since **Swift vs. Tyson** (1842), 16 Pet. 1, 10 L.Ed. 865, was overruled. See **Erie R. Co. vs. Tompkins** (1938), 304 U.S. 64 at 74-75. Uniform judicial administration of the Railway Labor Act will become an impossibility. Courts will become active protagonists in railway labor disputes. If strike conditions become too onerous, there will always be a more palatable alternative to settling the strike — apply to the courts for exemption from the criminal and civil prohibitions of the Railway Labor Act. If successful, the strike then need never end, and the longer it lasts the more benefit accrues to the railroad.

The doctrine enunciated by the Court of Appeals may have even wider implications. If strike conditions warrant judicial exculpation from the burdens of the Railway Labor Act, why not also from those of the Federal Em-

ployers' Liability Act, 45 U.S.C. 51-60, the Safety Appliance Act, 45 U.S.C. 1-16, 15 U.S.C. 77c, 49 U.S.C. 26-27, and any other federal statute the suspension of which may be reasonably necessary to make a meaningful reality of the railroad's apparently inalienable right to operate under strike conditions?

In summary, petitioners suggest that the ruling of the Court of Appeals below is both novel and of tremendous significance to the stability of harmonious labor-management relations in the railroad industry. Even if confined to the boundaries of the Fifth Circuit alone, an area extending from El Paso to Key West, the effect upon the Nation's transportation systems and economy will be profound and, we respectfully submit, disastrous. This Court should review such a decision.

2. The Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Unlike the National Labor Relations Act, 29 U.S.C. 141 et seq., the Railway Labor Act provides sharp "teeth" for violation of its prohibitions. Section 2, Tenth (45 U.S.C. 152, Tenth) of the Act provides as follows:

> "Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, *seventh*, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than

> $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, *and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense.* * * *" (emphasis added)

Clearly Congress intended its mandatory procedures to be obeyed. Yet one of the very sections which Congress selected to enforce with criminal sanctions, Section 2, Seventh,[6] is the section which the Court of Appeals has ruled may be suspended, in whole or part, by judicial decree upon a showing by the railroad of reasonable necessity to break the law in order to continue operations under adverse economic circumstances.

Petitioners know of no other holding by this Court, by any court of appeals, or state appellate court that permits a person to apply to a court of law for permission to violate a criminal statute on the basis of economic necessity. Such a radical doctrine surely deserves review by this Court, if not by both this Court and Congress too. And if such a doctrine is to be developed, it is more than passing strange that the first applicant for relief should be a multi-million-dollar railroad owned and operated by the largest financial colossus in the State of Florida, the

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[6]Section 2, Seventh, provides: "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 [Section 6] of this title." 45 U.S.C. 152, Seventh. None of the existing agreements involved in this case permits changes in rates of pay, rules, or working conditions in any manner other than in compliance with the Railway Labor Act.

duPont Estate. What other criminal laws may likewise be suspended to make a "meaningful reality" of the railroad's right to operate? Is Labor equally free when the going gets tough to apply for exemption from criminal laws that impede its cherished right to strike so as to make such right more meaningful? The Court of Appeals left these questions unanswered, but its decision requires that they be answered lest hope of settlement of the current and future railway labor disputes completely vanish. This Court should review the decision rendered below that economic necessity may warrant judicial suspension of a criminal statute.

3. The Court of Appeals has rendered a decision in conflict with a decision of this Court.

In **Brotherhood of Railroad Trainmen vs. Toledo, P. & W.R.R.** (1944), 321 U.S. 50, this Court unanimously held that affirmative federal equitable relief in the form of an injunction against violence was not available to a railroad which had repeatedly rejected arbitration. By this refusal the carrier had failed in its duty to make "every reasonable effort" to settle the dispute, a duty made mandatory by Section 2, First, of the Railway Labor Act, 45 U.S.C. §152, and one which Section 8 of the Norris-LaGuardia Act expressly makes a condition to the granting of equitable relief in a case arising out of a labor dispute. This Court there stated (321 U.S. at 63):

> "Respondent is free to arbitrate or not, as it chooses. But if it refuses, it loses the legal right to have an injunction issued by a federal court, or to put the matter more accurately, it fails to perfect the right to such relief. This is not compul-

sory arbitration. *It is compulsory choice between the right to decline arbitration and the right to have the aid of equity in a federal court.*" (emphasis supplied)

The factual parallel between the case at bar and the *Toledo* case is remarkable. There, as here, both the striking unions and the railroad had initially rejected arbitration after exhaustion of the Railway Labor Act procedures. There, as here, the dispute arose out of differences between the parties as to rates of pay. There, as here, the dispute was "long-continued". There, as here, the unions changed their position in regard to arbitration and acceded to the Federal Government's requests for arbitration. There, as here, the railroad persisted in its refusal to accept arbitration. There, as here, the railroad breached its duty under Section 2, First, of the Railway Labor Act to make "every reasonable effort" to settle the dispute.[7]

There, the carrier's persistent refusal precluded federal equitable relief, even in the form of an injunction against violence. Here, however, the doctrine of "reason-

[7]The FEC's refusal to agree to voluntary arbitration is not the only way that it has failed to make "every reasonable effort" to settle the current dispute. Since the strike began in January, 1963, the FEC has been adjudicated to be in violation of either the Railway Labor Act (or Public Law 88-108, an amendment thereto) on six separate occasions by two different federal district courts. The FEC has been found to be in wilful contempt of injunctions requiring it to comply with the Railway Labor Act on three separate occasions, the latest being in September, 1965. And on May 28, 1965, in *Florida East Coast Railway Co. vs. Gamser et al.*, Case No. 65-155-Civil-J, U. S. District Court for the Middle District of Florida, the FEC's complaint seeking equitable relief against the National Mediation Board was dismissed on the basis that the FEC had failed to "approach the conference table in good faith" during mediation efforts of the National Mediation Board.

ably necessary" exceptions to the categorical prohibitions of the Railway Labor Act, created and promulgated by the Court of Appeals, permits the respondent to seek affirmative federal equitable relief of the most extraordinary sort.

Under this Court's holding in the *Toledo* case, such relief is not available. Certiorari should be granted to resolve this conflict between a decision of this Court and that of the Court of Appeals below.

Conclusion

Petitioners pray that this Court grant the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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Of Counsel

Certificate of Service

I Hereby Certify that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served this 17 day of November, 1965, upon the following persons by depositing a copy of same addressed to each in the United States mail with sufficient air mail postage prepaid:

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Of Counsel for Petitioners

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 22134

FLORIDA EAST COAST RAILWAY COMPANY,
Appellant-Appellee,

versus

UNITED STATES OF AMERICA,
Appellee-Appellant,

(AND REVERSE TITLE)

Appeals from the United States District Court for the Middle District of Florida.

(July 21, 1965.)

Before TUTTLE, Chief Judge, EDGERTON,* and Smith,** Circuit Judges.

TUTTLE, Chief Judge: This is another chapter in the long dispute between the Florida East Coast Railway Company and its employees. It comes to us by an appeal

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* Senior Circuit Judge of the D. C. Circuit, sitting by designation.
** Of the Third Circuit, sitting by designation.

by the Railway from a preliminary injunction entered by the district court. That injunction, entered after the decision by this Court in *Florida East Coast Railway Company v. Brotherhood of Railway Trainmen*, 5th Cir., 336 F.2d 172, purports to put into effect what we there said would be permissible deviations from the collective bargaining agreements during the continuance of a strike. The dispute which brought about the suit in the earlier case and which caused the United States to file the suit in the instant case, is one and the same except that the 11 nonoperating unions whose members will be the beneficiaries under the present suit were the employees who went on strike on January 23, 1963, whereas the Brotherhood of Railway Trainmen, the plaintiff in the earlier case, was not on strike but its members observed the picket lines and thus were in substantially the same position and desirous of similar relief.

On the record there before us we made a number of holdings which, unless changed in this case, are in effect the law of the case. These holdings were included in the last full paragraph of the opinion, 336 F.2d 172, 182, which we here quote:

> " . . . The FEC is free to operate under the 1949 collective bargaining agreement amended by the November 2, 1959, notice, but FEC may not institute changes in rates of pay, rules and working conditions encompassed by the July 31, 1963, and September 25, 1963, notices until the statutory procedures are exhausted. To do so would be to frustrate the statutory mechanism

for orderly settlement of major disputes. This portion of the District Court's holding is clearly correct. It is, however, free to institute and maintain such employment practices, etc. as are, and continue to be reasonable necessary to effectuate its right to continue to run its railroad under the strike conditions. We do not express any opinion as to the outcome of the District Judge's examination of proposed changes under the select, item-by-item approach that we articulate. However, since he has enjoined the FEC from operating under any terms except those embodied in the pre-November 2, 1959, agreement, we think the most rational approach is to continue our stay of March 17, 1964, until the District Court has an opportunity to consider the nature and scope of the orders to be entered consistent with this opinion. As soon as the District Judge takes hold of the case, our stay will automatically expire."

When the motion for preliminary injunction in the present case came on before the district court, the district judge delayed handing down his decision because of the pendency of the appeal in the earlier case. After this Court's decision was handed down on August 29, 1964, Judge Simpson entered injunctions in both cases. On October 30, 1964, the trial court restrained the FEC from continuing in effect or implementing in any respect the changes in rates of pay, rules, or working conditions announced in the §6 notices of September 24, 1963 and July 31, 1963, from implementing or continuing in effect the

"conditions of employment" of September 1, 1963 and from

> "making any other changes in rates of pay, rules or working conditions of its employees in crafts or classes covered by existing collective bargaining agreements except in accordance with the procedures of the Railway Labor Act or except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court during the pendency of the current strike."

On November 12, the FEC filed in the trial court an application for the approval of certain employment practices which it contended were "reasonably necessary" to enable it to continue to operate during the strike. The court granted a stay of its earlier order insofar as it required the FEC to adhere to its agreements with respect to the requested applications pending a hearing on the application for approval of the specific employment practices.

The employment practices departing from the existing collective bargaining agreements which FEC sought permission to put into effect were as follows:

> (1) The use of existing personnel to do work across craft lines and seniority districts;
>
> (2) The use of supervisors to perform craft work in the absence of sufficient qualified personnel;

(3) The exceeding of apprentice and/or trainee ratios or maximum age limitations contained in existing agreements;

(4) The use of non-exempt foremen to perform scope work in the absence of sufficient qualified personnel;

(5) The contracting out of work which FEC did not have personnel available to perform itself;

(6) The performance of the work of bridge tender by supervisory or contract employees;

(7) The furnishing of seniority rosters to labor organizations only if a protective order issued from the court making misuse of the information contained therein punishable as a contempt of court; and

(8) The treating of union shop agreements as void and unenforceable as to replacement workers and returnees until the labor organizations demonstrated their intention to make membership therein available to new employees without discrimination, after which the new employees should have thirty days in which to apply for membership.

Following the hearing on the merits of these several applications, the trial court, in an order entered on December 3, 1964, denied Numbers 1, 4, 7 and 8 but granted Number 3; denied Number 2 except for several positions for a limited time; denied Number 5 except that FEC was

permitted to continue to contract out that work which was presently being contracted out; and denied Number 6 except that FEC was permitted to use contract or supervisory employees as bridge tenders for a restricted period (later extended by supplementary order).

The Railway filed its notice of appeal from the order dated October 30 and the order dated December 3, denying approval of departures from the existing contracts in the respects requested. The United States filed a cross-appeal from both injunctive orders.

A threshold question is raised by a motion by the Railway to dismiss the appeal of the United States on the grounds that the United States has no standing to litigate this case and, as an appellant, it is not a party aggrieved by the decision of the lower court. This motion to dismiss was supported by memoranda but this court, by order dated March 12, 1965, directed that the motion be carried with the case to be heard and considered at the time of the hearing of the case on the merits.

We dispose first of the contention that the United States has no standing in the litigation. The contention of the Railway is that since there is here no actual "interruption to interstate commerce" the United States has no right under the Commerce Clause of the United States Constitution to maintain the suit. This distinguishes the case, the Railway says, from *Re Debs*, 158 U.S. 564, in which it was held by the Supreme Court that a strike then in existence against the railroad gave the United States standing to seek an injunction to prevent a substantial part of commerce from coming to an actual stop.

The Railway further contends that the United States has no inherent power to litigate for the purpose of "protecting the jurisdiction" of the National Mediation Board, which jurisdiction is said to be endangered by FEC's alleged violations of the Railway Labor Act. The standing of the United States as an appellant here is further contested by the Railway on the theory that it was not an aggrieved party as a result of the decision of the court below.

The United States contends that its right to file the original action is threefold. It says (1) It has a right of action based upon the Commerce Clause of the Constitution to enjoin conduct which obstructs interstate commerce, under the *Debs* case; (2) it has a right of action to enforce the provisions of the Railway Labor Act, and (3) it has standing to sue in order to protect the jurisdiction of the National Mediation Board, and to aid that agency in the carrying out of its statutory functions. We think we need go no further than to hold, as we do, that the allegations of the complaint touching on the threat of obstructing interstate commerce is sufficient to bring the case within the ambit of the court's decision in *Re Debs, supra.* See also *United States v. City of Jackson, Mississippi*, 5th Cir. 318 F.2d 1. Not only the allegations, but the proof adduced on the hearing for preliminary injunction, establish at least preliminarily that the actions of FEC, which we have, by our earlier decision, found to violate the Railway Labor Act, are a substantial threat to the free flow of interstate commerce. Moreover, as called to our attention by the United States, the Act itself in 45 U.S.C.A. 152 Tenth seems to authorize this type of

proceeding by the United States. This provision is as follows:

> "The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, . . . It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof . . ."

Finding, as we do, that the United States had standing to bring the action, it follows necessarily that, having not completely prevailed in the trial court in seeking to prevent all modifications of the existing employment contracts, the United States may be considered as an aggrieved party for the purpose of filing its cross-appeal.

On the merits of the appeal both the Railway and the Government reargue much of what has already been decided by this Court in the *BRT* case, *supra*, and both formally in their briefs request a modification of the Court's decision in that case. The United States particularly while stating that the solution there was probably as equitable a one as could be devised, if any deviations at all could be recognized on account of strike conditions,

nevertheless contended that under the statute no deviations were permissible. As we stated in the *BRT* case, 336 F.2d at 181, "when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each. On the side of labor, it is the cherished right to strike. On management, the right to operate, or at least the right to try to operate." We then stated, "But this right of self-help is not a license for wholesale abrogation of the agreement. As the term implies, it is help which is reasonably needed to meet the impasse of a railroad desiring to run and unions unwilling to furnish workers." We concluded that the manner in which this impasse could be resolved was to permit the Railway "to institute and maintain such employment practices, etc. as are, and continue to be, reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions." 336 F.2d at 182.

We are not disposed to modify the law of the case now that the trial court has undertaken to carry out the mandate in the *BRT* case. We shall undertake to determine whether, in the case before us, the court has adequately understood and given effect to our earlier decision.

The Railway makes a major attack on the procedural steps which the trial court imposed on it, that is, forbidding it to deviate in the slightest degree from the existing employment contract "except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court . . ." The Railway contended that it should be permitted to institute the deviations and leave it to the

United States or the Brotherhoods to complain to the trial court and carry the burden of proving the deviation not to be "reasonably necessary" in the strike conditions.

We think that the prior decision of this Court was so worded as to permit the trial court to adopt the procedure which it followed in entering the injunction of October 30. We think it entirely appropriate that since a departure from the employment contracts is, as clearly stated by us in our prior opinion, the exception even during the strike it is appropriate for the burden of showing the necessity for such departure to be placed on the party claiming the privilege.

Coming finally to the specific departures permitted and forbidden by the trial court to the Railway, we note that in our earlier opinion we made the following comment: "While this appears to move the Judge from the firing line, Townsend v. Sain, 1963, 372 U.S. 293, 319, 83 Sup. Ct. 745, 9 L.Ed.2d 770, into the locomotive cab, it is not for him to decide what to pay, etc. His task is to pass on what FEC had done or proposes to do." We think it even less appropriate for this Court itself to attempt to take the engineer's place in a locomotive cab. We know full well that the distinguished trial Judge has had a long familiarity with the Florida East Coast Railroad and its operations, and more particularly in recent years he has had much experience with its labor problems. We think that his findings and determinations with respect to the departures from the employment contract reasonably necessary under strike conditions are as much entitled to be undisturbed except upon a finding that they are

clearly erroneous as are other findings of fact by a trial court sitting without a jury. We find none of his determinations in this respect to be without a substantial basis on the record as a whole to support them. We therefore decline to interfere either with these findings or with the normal discretionary power of the trial court in the granting of interlocutory orders in such a case as this.

On the appeal by the Florida East Coast Railroad Company, the judgment is AFFIRMED. On the cross-appeal of the United States, the judgment is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October Term, 1964

No. 22134

D. C. Docket No. 64-107-CIV-J

FLORIDA EAST COAST RAILWAY COMPANY,
Appellant-Appellee,

versus

UNITED STATES OF AMERICA,
Appellee-Appellant.

(AND REVERSE TITLE)

Appeals from the United States District Court for the Middle District of Florida

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Before TUTTLE, Chief Judge, EDGERTON,* and SMITH,** Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

* Senior Circuit Judge of the D. C. Circuit sitting by designation.
** Of the Third Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court on the appeal by the Florida East Coast Railway Company and on the cross-appeal of the United States, in this cause be, and the same is hereby, affirmed.

July 21, 1965

Issued as Mandate: August 12, 1965.

APPENDIX C

RAILWAY LABOR ACT

45 U.S.C. 151 - 163

Section 2, First (45 U.S.C. 152, First):

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Seventh (45 U.S.C. 152, Seventh):

> "Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 2, Tenth (45 U.S.C. 152, Tenth):

> "Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a mis-

demeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

Section 5, First (45 U.S.C. 155, First):

"First. The parties, or either party, to a dispute between an employee or group of employees

and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period

the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

Section 5, Third (e) (45 U.S.C. 155, Third (e)):

"(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact, including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective."

Section 6 (45 U.S.C. 156):

"Carriers and representatives of the employees shall give at least thirty days' written notice of

an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197."

Section 10 (45 U.S.C. 160):

"If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to in-

vestigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

"There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

"After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose. May 20, 1926, c. 347, § 10, 44 Stat. 586; June 21, 1934, c. 691, § 7, 48 Stat. 1197."

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

FLORIDA EAST COAST RAILWAY COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 21, 1965.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–9a) is reported at 348 F. 2d 682. The findings of fact and conclusions of law of the district court and the injunction and order issued by that court (App. B, *infra*, pp. 10a–25a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1965 (App. A, *infra*, pp. 1a–9a). By orders entered on October 15, 1965, and November 18, 1965,

Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 2, Seventh of the Railway Labor Act (45 U.S.C. 152, Seventh) provides that "[n]o carrier * * * shall change the rates of pay, rules, or working conditions of its employees * * * as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title [providing for notice, negotiation, and access to mediation before such changes are made]." The question presented is whether, while a lawful strike against a railroad carrier is in progress, the carrier may partially ignore this unqualified prohibition and institute unilateral changes in pay rates, rules or working conditions, without negotiation or mediation, on the ground that such changes are "reasonably necessary" to enable the carrier to operate during the strike.[1]

[1] In the court of appeals, an issue was also raised as to the standing of the United States to bring a suit for injunction to enforce the provisions of the Railway Labor Act. The court of appeals held that the United States does have such standing (App. A, *infra*, pp. 5a–7a). In our view, this decision was clearly correct, and we do not therefore include the standing of the United States as a question presented. However, if this petition is granted and if respondent continues to urge, as a basis for affirmance of the decision of the court of appeals, that the United States lacked standing, we shall discuss this question in the brief on the merits.

STATUTES INVOLVED

Sections 2, Seventh, and 6 of the Railway Labor Act, as amended, 44 Stat. 577, (45 U.S.C. 151 *et. seq.*) provide:

> Section 2, Seventh (45 U.S.C. 152, Seventh). *Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden.*
>
> No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.
>
> Section 6 (45 U.S.C. 156). *Procedure in changing rates of pay, rules, and working conditions.*
>
> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after

termination of conferences without request for or proffer of the services of the Mediation Board.

Other pertinent provisions of the Railway Labor Act are reproduced in Appendix D, *infra*, pp. 45a–50a.

STATEMENT

I. BACKGROUND

This case arises out of a strike on the Florida East Coast Railway ("FEC"), which began in January, 1963, and which has since become the longest strike in American railroad history. The strike began after mediation had failed to settle a wage dispute between the railroad and its non-operating unions.[2]

When the non-operating unions struck on January 23, 1963, most operating employees refused to cross the picket lines.[3] The railroad temporarily shut down but, on February 3, 1963, began to resume operations by using supervisory personnel and replace-

[2] The full background of the strike is given in the Report of the Emergency Board created by the President pursuant to Section 10 of the Railway Labor Act, 45 U.S.C. 160, in an attempt to settle the strike (Exh. Vol. 451–490). The wage dispute had originally arisen on virtually all railroads in the United States, and bargaining took place on a national basis. All carriers other than FEC ultimately reached agreement with the unions. However, prior to the time this agreement was reached, FEC withdrew from the national bargaining and proposed terms different from those offered by other carriers. FEC's proposals were unacceptable to its unions, and no agreement could be reached.

[3] "Non-operating" unions are those representing employees who do not actually operate the trains, such as machinists, telegraphers, electrical workers and clerks, whereas "operating" unions are those representing employees who run the trains, such as trainmen, engineers and firemen.

ments for the strikers and for the operating employees who would not cross the picket lines. The carrier's program of recruiting replacements was successful and, by October, 1963, FEC was carrying approximately 95 per cent of the volume of carload freight which it had carried prior to the strike (Tr. Vol. I, 182, 363). FEC did not attempt to reinstate its less profitable passenger and less-than-carload freight services (Exh. Vol. 459–460).

In reinstating carload freight service through the use of replacements and supervisory employees, FEC disregarded the existing rates of pay, rules and working conditions set forth in its collective bargaining agreements with the unions representing its employees. After it resumed operations, FEC operated under rules of its own making which were unauthorized by its agreements and which were instituted with no attempt to comply with the notice, negotiation and mediation procedures required by Section 6 of the Railway Labor Act (45 U.S.C. 156) when such changes in existing conditions are proposed. On September 1, 1963, these unilateral changes in rules and conditions were embodied in a document entitled "Conditions of Employment" (Exh. Vol. 4–35), which all new employees were required to sign before going to work (Exh. Vol. 75).

On September 24, 1963, after FEC's unilateral implementation of the new "Conditions of Employment," FEC served statutory notices on all non-operating unions, proposing to abolish the existing collective-bargaining agreements in their entirety and

to substitute a "Uniform Working Agreement" (Exh. Vol. 402–440), a slightly expanded version of the "Conditions of Employment" (Tr. Vol. I 313–321). On October 18, 1963, FEC met with the unions pursuant to the Act to discuss this proposal, but the unions objected to the presence of a court reporter brought to the conference by FEC and the meeting terminated. The unions then invoked the services of the National Mediation Board under Sections 5 and 6 of the Act but FEC insisted that it was free to implement its proposals without prior mediation because the unions had refused to bargain (Exh. Vol. 440–441.) On October 30, 1963, FEC unilaterally placed the "Uniform Working Agreement" into effect, and refused to rescind this action when, on the following day, the National Mediation Board rejected its legal position and docketed the dispute for mediation (Exh. Vol. 442–447). After October 30, 1963, employees hired by FEC were required to sign copies of the "Uniform Working Agreement" (Tr. Vol. I 283–284).

From October 30, 1963, until November 14, 1964, when the district court's injunction in this case (App. B, *infra,* pp. 20a–22a) took effect, FEC operated under the Uniform Working Agreement. FEC enjoyed a substantial increase in its operating profit during this strike period.[4]

II. THE PRESENT SUIT AND THE TRAINMEN'S CASE

The present suit was instituted on April 30, 1964, when the United States filed a complaint alleging that

[4] This is revealed by FEC's annual and quarterly reports to the Interstate Commerce Commission and by FEC's 1964 Annual Report to Shareholders, p. 20.

FEC had violated Sections 2, Seventh, and 6 of the Railway Labor Act, *supra,* pp. 3–4, by its unilateral implementation, as to its non-operating employees, of changes in rates of pay, rules, and working conditions without notice and before the termination of mediation. The United States requested that FEC be enjoined from continuing to implement such changes without having followed the statutory procedures. Hearings were held before the district court in May, 1964.

Thereafter, on August 18, 1964, the Fifth Circuit ruled in *Florida East Coast Ry. Co.* v. *Brotherhood of R. Trainmen,* 336 F. 2d 172, certiorari denied, 379 U.S. 990, a parallel injunctive suit brought against FEC by a union representing operating employees, that FEC had violated the Railway Labor Act by its wholesale abrogation of the existing collective bargaining agreements without compliance with the statutory procedures. This decision is reproduced in Appendix C, *infra,* pp. 26a–44a. The court of appeals also ruled, however, that FEC, without compliance with the Act, could institute such departures as the district court found to be "reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions" (App. C, *infra,* p. 43a; 336 F. 2d at 182). The Trainmen filed a petition for a writ of certiorari, attacking, among other holdings, the ruling that FEC could make "reasonably necessary" departures from its agreements. However, at the time the petition was filed, no such departures had been applied for by FEC or granted by the district

court, and this Court denied certiorari. 379 U.S. 990.[5]

Pursuant to the Fifth Circuit's decision in the *Trainmen*'s case, the district court subsequently entered blanket injunctions in both that case and this case (App. B, *infra,* pp. 20a–22a) requiring FEC to abide by rates of pay, rules and working conditions specified in the existing collective bargaining agreements until the termination of the statutory mediation procedures. On November 12, 1964, FEC filed in this case an application in the district court pursuant to the *Trainmen*'s decision for the approval of certain departures from its existing agreements with its non-operating unions which it contended were "reasonably necessary" to operate the trains. On December 3, 1964, the court granted some of the requests and denied others (App. B, *infra,* pp. 23a–25a). Specifically, FEC was permitted to exceed the ratio of apprentices to journeymen set forth in the agreements, to contract out certain work, and to use supervisory personnel to perform certain jobs for which FEC had shown that properly trained personnel were unavailable.

Both sides appealed. FEC took the position, which had been rejected by the court of appeals in the *Trainmen*'s decision, 336 F. 2d at 180, that its agree-

[5] FEC opposed the Trainmen's petition, arguing with respect to the issue of the correctness of the "reasonably necessary" rule that "the attempt to secure review of this feature of the Court of Appeals holding raises at best an hypothetical question on which at the present time there is no record at all upon which this Court could make any determination." Brief in Opposition, *Brotherhood of Railroad Trainmen* v. *Florida East Coast Railway Co.* (No. 691, Oct. Term, 1964), p. 12.

ments were totally "suspended" for the duration of the strike, and that it could operate under any work rules it desired during the strike. The United States contended, on the other hand, that the Act flatly forbids a railroad from unilaterally implementing any changes in rates of pay, rules or working conditions without negotiation, and that the district court had therefore erred in permitting any variations from the agreement. Relying upon the *Trainmen*'s case, the court of appeals affirmed. In the court's view, "when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each. On the side of labor, it is the cherished right to strike. On management, the right to operate, or at least the right to try to operate" (App. A, *infra,* pp. 7a–8a).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals in this case—permitting a railroad carrier unilaterally to depart from existing rates of pay, rules, or working conditions where "reasonably necessary" to offset the impact of a lawful strike—is contrary to the unambiguous and unqualified language of the Railway Labor Act. The exception to the Act thus judicially created for the first time, permits carriers to circumvent the carefully specified procedures for negotiation and mediation which the Act prescribes as the primary means for settling labor disputes in the railway industry. In our view, there is no basis in law or policy for the exception thus created; we believe, moreover, that this exception constitutes a potentially

serious disruptive element in railway labor relationships with effects well beyond the particular labor dispute here involved. This latter consideration is especially pertinent with regard to the sensitive and pervasive work-rules disputes presently troubling the industry. In order to remove this source of potential labor conflict, and to reaffirm that the Railway Labor Act indeed means what it states in terms—that no unilateral changes in existing rates of pay, rules, or working conditions may be made without prior recourse to the negotiation and mediation procedures of the Act—it is important for the Court to review the decision below in this case and thus to settle this basic issue in the administration of the Railway Labor Act.[6]

1. The Railway Labor Act specifies the procedures to be used by a carrier covered by the Act in implementing changes in existing rates of pay, rules, or working conditions of its employees covered by collective bargaining agreements. Specifically, Section 2, Seventh, of the Act flatly prohibits unilateral changes of this nature on the carrier's part by providing:

> No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in

[6] A petition for a writ of certiorari has already been filed to review the judgment of the court of appeals in this case by the non-operating unions, who were intervenors in the district court and appellees in the court of appeals. *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO, et al.* v. *Florida East Coast Railway Co.*, No. 750, Oct. Term, 1965.

> agreements except in the manner prescribed in such agreements or in section 156 of this title.

Section 6 of the Act (45 U.S.C. 156), entitled "Procedure in changing rates of pay, rules, and working conditions," provides that the party desiring a change in conditions "shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions."[7] Within this 30-day period preceding the change a conference must be agreed upon between the parties to the dispute (*ibid.*).

The Act thus requires face-to-face negotiation prior to the implementation of any change in existing conditions of employment. If this negotiation is unsuccessful in reaching agreement prior to the implementation of the change, the Act further provides that either party to the dispute may request the services of the National Mediation Board (as the unions did here) or that the Board may proffer its services on its own initiative; and that, in either event, the "Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement" (Section 5, First, 45 U.S.C. 155, First).

[7] The uniform understanding of Section 6 seems to be that it is applicable to all changes in existing conditions which were set through collective bargaining, even though the collective-bargaining agreement embodying those conditions may formally have terminated. The issue, in any event, ordinarily does not arise, for collective bargaining agreements in Railway Labor Act industries—including the agreement in this case—do not generally terminate on a fixed date, but continue either until a new agreement is reached or until the negotiation and mediation processes prescribed by the Act have broken down.

"If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavour * * * to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter" (*ibid.*). During this entire period in which the proposed change is subject to negotiation, mediation or arbitration, it is expressly provided that "rates of pay, rules, or working conditions shall not be altered by the carrier" (Section 6; Section 5, First). Should mediation fail, Section 10 of the Act (45 U.S.C. 160) further provides for the creation of a Presidential board of review to consider the dispute in cases of sufficient importance and, while such a board is in existence, the Act again explicitly provides that "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose" (*ibid.*).

Thus, the Act carefully provides, through a series of detailed provisions, for negotiation, mediation and arbitration before a carrier may make unilateral changes in existing rates of pay, rules and working conditions. Before these statutory procedures are invoked, and while the possibility remains that the dispute will be amicably settled through the use of any one of them, the Act explicitly forbids unilateral action by the carrier in the matters as to which change is sought. Such changes may be made only after the statutory procedures fail to bring about a negotiated solution to the particular controversy. Orderly negotiation—rather than unilateral implementation of

changes—is integral to the scheme of the Act and its fundamental purpose "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions" (45 U.S.C. 151a (4)). See *Elgin, J. & E.R. Co.* v. *Burley,* 325 U.S. 711, 725.

Despite these unambiguous statutory provisions, and although it recognized in the *Trainmen*'s case (App. C, *infra,* p. 35a) that the FEC here, "with no pretense at compliance with the Act," "has unilaterally instituted wholesale changes" relating to rates of pay, hours, and working conditions some of which it "seeks to establish permanently," the court of appeals nevertheless, and for the first time, created an exception to the Act permitting unilateral changes in existing conditions without resort to negotiation or access to mediation. Specifically, the court held that where lawful strike conditions exist a carrier is free unilaterally to implement changes in its existing employment conditions which "may be reasonably necessary in light of the strike conditions" (App. C, *infra,* p. 42a).

Neither the words nor the purposes of the Act suggest such a "strike conditions" exception, and no intimations in that regard can be found in the legislative history.[8] Nor is the reason given by the court

[8] In all the proceedings arising from this strike, FEC has been unable to point to any legislative history even remotely suggesting that Congress intended any relaxation of the prohibition against unilateral changes in agreements. We are also unaware of any such expression of Congressional intention. The legislative history is silent on the exact question presented

of appeals to support its exception persuasive—that where a union has resorted to self-help through a strike a carrier ought to have a similar right (See App. A, *infra*, pp. 7a–8a). It is true that FEC here has been subjected to a strike over a wage dispute. That dispute, however, was made the subject of statutory negotiation and mediation and the unions involved therein did not invoke self-help and institute a strike until after the statutory procedures, including a Presidential fact finding board appointed under Section 10 of the Act, had been exhausted. The strike of which FEC complains, therefore, is entirely lawful and is in no way a circumvention of the negotiation and mediation provisions of the Act; it was instituted only after negotiation had failed and self-help became the only remaining remedy. Under the court of appeals' decision, however, FEC may rely upon that strike to by-pass the statutory procedures with respect to separate issues which have never been the subject of statutory negotiation or mediation.

The court of appeals held that it should create a "strike" exception to the unequivocal language of Section 2, Seventh, because such an exception was necessary to effectuate the carrier's right to self-help—*i.e.*, its ability to operate, or to try to operate, during a strike (App. A, *infra*, pp. 7a–8a). We note, however,

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here, very likely because it was assumed (a) that after the passage of the Act strikes and lockouts in the railroad industry would "cease," see S. Rep. 304, 66th Cong., 1st Sess., p. 22 (1919); 67 Cong. Rec. 4582 (1926), or (b) that any strike would be accompanied by a total cessation of service.

that FEC is the only railroad carrier to attempt to operate during a strike in the last five years.[9] In any event, in the face of the clear language and purpose of the Act, the court of appeals was in error in creating an exception to statutory requirements in order to prevent what it believed to be an imbalance of power between unions and employers. Cf. *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 315–316.[10]

2. We thus urge that the decision of the court of appeals—permitting unilateral changes by the carrier of rate of pay, rules, and working conditions as a counter to lawful strike activity—is erroneous in that it conflicts with the clear terms and policy of the Railway Labor Act. In addition, it creates an exception of uncertain content and application to the orderly negotiation and mediation procedures of the Act. Unless the decision below is reversed, the existence of such an exception, we believe, is bound to constitute a seriously disruptive element in railway labor relationships.

Throughout the history of the Railway Labor Act a judicial exception to the Act's mediation procedures for "strike conditions" has never been thought nec-

[9] All other means of self-help available to an employer remained available to these carriers, as well as to FEC. One means of self-help available to railroads of considerable potential effectiveness would be an industry-wide strike insurance plan. See *Kennedy* v. *Long Island R. Co.*, 319 F. 2d 366 (C.A. 2), certiorari denied, 375 U.S. 830.

[10] Carriers, of course, are free to institute those changes in agreements as to which the statutory procedure for notice and mediation has been followed.

essary before this dispute. FEC has shown no reason now, for the first time, to find inherent in the Act the power to circumvent orderly procedures which the court of appeals has accorded to strike-affected carriers.

This exception to the Act's procedures during strike conditions also will have an inevitably unsettling effect upon the ultimate resolution of labor disputes in the railway industry. In the first place, having unilaterally made changes "reasonably necessary" to continue operation during a strike—changes permitting more economical operation with fewer employees and less strict work rules—a carrier may well have little incentive to attempt to reach a settlement of the dispute which led to the strike, and indeed, may have strong reason to prolong it. Thus, under the court of appeals' decision, a strike may result in a beneficial windfall to the carrier, permitting it to operate its most profitable services under rules much less favorable to its employees than the rules arrived at through the collective bargaining process.[11] In certain circum-

[11] Thus, under the rule announced in the court of appeals, Federal district courts may well be in the position, not merely of effectuating a carrier's right to attempt to operate, but also of rendering a strike ineffectual. Federal judges should not, however, thus make changes in the balance of power between union and employer by granting *ad hoc* relief to one or another of the adversaries. Compare *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 315–316. The area into which the decision below would have the district courts intrude is one of "delicate and contemporaneous issues of policy" where "economic sympathies and prepossessions [of individual district judges] may unwittingly foreclose the solution of these issues." Frankfurter and Greene, *The Labor Injunction* (1930) p. 132.

stances, moreover, railroads might even find it advantageous to precipitate strikes over one issue in order to circumvent the process of negotiation and mediation required for the making of changes in work rules or working conditions otherwise required by the Act. At the very least, the "reasonably necessary" rule would, when invoked, broaden the area of dispute between the parties since the changes in pay, work rules and conditions unilaterally effectuated through the doctrine will surely constitute new issues between the parties in addition to those which originally led to the strike. All of these dangers are illustrated in this case, where FEC's unilateral changes have superimposed a work-rules disputes onto an existing wage dispute and have, without question, decreased the likelihood of a reasonably prompt settlement of the underlying strike.

Such an exception to the Act, moreover, while formally limited to permitting unilateral changes only *during* a strike, would inevitably have adverse effects upon the mediation of proposed permanent changes desired by the carrier. In this case, for example, the district court has authorized FEC to make "temporary" changes which are also encompassed in Section 6 notices proposing permanently to substitute the "Uniform Work Agreement" for its present agreements.[12] Mediation over the proposed permanent

[12] For example, in permitting FEC to depart from the ratio of apprentices to journeymen and from age limitations set forth in existing agreements, the district court has allowed FEC to put into effect a portion of the Uniform Working Agreement (Exh. Vol. 38–74) which imposes no such limitations upon FEC, and instead contains sweeping management prerogatives clauses leaving such matters entirely up to FEC (Exh. Vol. 38–40).

changes by the National Mediation Board is thus jeopardized because the parties are placed in the position of discussing "proposed" changes some of which already are in effect. The entire emphasis of the Railway Labor Act, however, is upon bargaining over *proposed* changes in the agreements, with implementation of such changes prior to termination of mediation explicitly prohibited. See, *e.g., Manning* v. *American Airlines,* 329 F. 2d 32, 35 (C.A. 2), certiorari denied, 379 U.S. 817; *Butte Anaconda & P. Ry. Co.* v. *Brotherhood of L. F. & E.,* 268 F. 2d 54 (C.A. 9), certiorari denied, 361 U.S. 864. A carrier with actual benefits of proposed changes in hand, or with an awareness of the possibility of effectuating them at any time, without mediation, is less likely to engage in meaningful bargaining as contemplated by the Act.[13]

3. In sum, the court of appeals new exception to the clear requirements of the Railway Labor Act may well encourage carriers to precipitate or prolong strikes in the railway industry as a means of unilaterally implementing desired work-rules changes without preceeding negotiation or mediation.[14] It will, in

[13] As the court of appeals itself recognized in the *Trainmen*'s case, the processes of bargaining and mediation called for by the Act, and carried on with the assistance of Federal mediators, are "a sham if a Carrier has already done in fact what it formally seeks to do in negotiation of a § 6 notice." *Florida East Coast Ry. Co.* v. *Brotherhood of R. Trainmen, supra,* 336 F. 2d at 180.

[14] The success of FEC's illegal actions during this strike has not been unnoticed, and surely must tempt other railroad management. As stated in a trade journal:

> Chapter or footnote, there seems little doubt that the FEC strike will haunt railway labor for years. Less clear

any event, disrupt the mediation process as it pertains to proposed permanent work-rules changes by providing a potential means for immediate implementation of such changes without engaging in good-faith bargaining and without waiting for the termination of the mediation process. It is important, in our view, for this Court to reject a principle, wholly unsupported by the Act and never before thought to be a necessary ingredient in railway-labor relationships, which threatens to subvert the statutory mediation procedures and which is thus likely to be productive of increased acrimony and failure to bargain in the railway industry.[15]

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is the effect the strike will have on railway management. Railroad managers will ponder for a long time the fact that FEC survived without its union people—and got back into full freight operation with less than half the men formerly required to handle the work.

Railway Age, *The FEC Story: Survival without Unions?* (July 27, 1964), pp. 34–35.

[15] Although no conflict exists among court of appeals decisions upon the exception to the Railway Labor Act created by the court of appeals in this case, the issue will almost certainly recur in the lower federal courts as a result of the decision below and it is unlikely that this Court will have another opportunity to resolve it in the foreseeable future. The vitality of the issue depends upon the continuance of a strike, and the present FEC strike is of unusually great length. Thus, if the decision below is not reversed, its principle might well be used in the future to circumvent the Railway Labor Act and bypass the negotiation and mediation required by statute, without the issue ever being presented for appellate judicial consideration. The issue presented here probably will not arise in a damage suit, even assuming that such a suit will lie for violation of the Railway Labor Act, since a district court's order permitting "reasonably necessary" changes would likely be a defense to such an action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1965.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 22134

FLORIDA EAST COAST RAILWAY COMPANY,
APPELLANT-APPELLEE

v.

UNITED STATES OF AMERICA, APPELLEE-APPELLANT
(AND REVERSE TITLE)

Appeals from the United States District Court for the Middle District of Florida

(July 21, 1965)

Before TUTTLE, Chief Judge, EDGERTON,[1] and SMITH,[2] Circuit Judges

TUTTLE, Chief Judge: This is another chapter in the long dispute between the Florida East Coast Railway Company and its employees. It comes to us by an appeal by the Railway from a preliminary injunction

[1] Senior Circuit Judge of the D.C. Circuit, sitting by designation.

[2] Of the Third Circuit, sitting by designation.

entered by the district court. That injunction, entered after the decision by this Court in *Florida East Coast Railway Company* v. *Brotherhood of Railway Trainmen*, 5th Cir., 336 F. 2d 172, purports to put into effect what we there said would be permissible deviations from the collective bargaining agreements during the continuance of a strike. The dispute which brought about the suit in the earlier case and which caused the United States to file the suit in the instant case, is one and the same except that the 11 non-operating unions whose members will be the beneficiaries under the present suit were the employees who went on strike on January 23, 1963, whereas the Brotherhood of Railway Trainmen, the plaintiff in the earlier case, was not on strike but its members observed the picket lines and thus were in substantially the same position and desirous of similar relief.

On the record there before us we made a number of holdings which, unless changed in this case, are in effect the law of the case. These holdings were included in the last full paragraph of the opinion, 336 F. 2d 172, 182, which we here quote:

> "* * * The FEC is free to operate under the 1949 collective bargaining agreement amended by the November 2, 1959, notice, but FEC may not institute changes in rates of pay, rules and working conditions encompassed by the July 31, 1963, and September 25, 1963, notices until the statutory procedures are exhausted. To do so would be to frustrate the statutory mechanism for orderly settlement of major disputes. This portion of the District Court's holding is clearly correct. It is, however, free to institute and maintain such employment practices, etc. as are, and continue to be reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions. We do not express any opinion as to the outcome of the District

> Judge's examination of proposed changes under the select, item-by-item approach that we articulate. However, since he has enjoined the FEC from operating under any terms except those embodied in the pre-November 2, 1959, agreement, we think the most rational approach is to continue our stay of March 17, 1964, until the District Court has an opportunity to consider the nature and scope of the orders to be entered consistent with this opinion. As soon as the District Judge takes hold of the case, our stay will automatically expire."

When the motion for preliminary injunction in the present case came on before the district court, the district judge delayed handing down his decision because of the pendency of the appeal in the earlier case. After this Court's decision was handed down on August 29, 1964, Judge Simpson entered injunctions in both cases. On October 30, 1964, the trial court restrained the FEC from continuing in effect or implementing in any respect the changes in rates of pay, rules, or working conditions announced in the § 6 notices of September 24, 1963 and July 31, 1963, from implementing or continuing in effect the "conditions of employment" of September 1, 1963 and from

> "making any other changes in rates of pay, rules or working conditions of its employees in crafts or classes covered by existing collective bargaining agreements except in accordance with the procedures of the Railway Labor Act or except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court during the pendency of the current strike."

On November 12, the FEC filed in the trial court an application for the approval of certain employment

practices which it contended were "reasonably necessary" to enable it to continue to operate during the strike. The court granted a stay of its earlier order insofar as it required the FEC to adhere to its agreements with respect to the requested applications pending a hearing on the application for approval of the specific employment practices.

The employment practices departing from the existing collective bargaining agreements which FEC sought permission to put into effect were as follows:

(1) The use of existing personnel to do work across craft lines and seniority districts;

(2) The use of supervisors to perform craft work in the absence of sufficient qualified personnel;

(3) The exceeding of apprentice and/or trainee ratios or maximum age limitations contained in existing agreements;

(4) The use of non-exempt foremen to perform scope work in the absence of sufficient qualified personnel;

(5) The contracting out of work which FEC did not have personnel available to perform itself;

(6) The performance of the work of bridge tender by supervisory or contract employees;

(7) The furnishing of seniority rosters to labor organizations only if a protective order issued from the court making misuse of the information contained therein punishable as a contempt of court; and

(8) The treating of union shop agreements as void and unenforceable as to replacement workers and returnees until the labor organizations demonstrated their intention to make membership therein available to new employees without

discrimination, after which the new employees should have thirty days in which to apply for membership.

Following the hearing on the merits of these several applications, the trial court, in an order entered on December 3, 1964, denied Numbers 1, 4, 7 and 8 but granted Number 3; denied Number 2 except for several positions for a limited time; denied Number 5 except that FEC was permitted to continue to contract out that work which was presently being contracted out; and denied Number 6 except that FEC was permitted to use contract or supervisory employees as bridge tenders for a restricted period (later extended by supplementary order).

The Railway filed its notice of appeal from the order dated October 30 and the order dated December 3, denying approval of departures from the existing contracts in the respects requested. The United States filed a cross-appeal from both injunctive orders.

A threshold question is raised by a motion by the Railway to dismiss the appeal of the United States on the grounds that the United States has no standing to litigate this case and, as an appellant, it is not a party aggrieved by the decision of the lower court. This motion to dismiss was supported by memoranda but this court, by order dated March 12, 1965, directed that the motion be carried with the case to be heard and considered at the time of the hearing of the case on the merits.

We dispose first of the contention that the United States has no standing in the litigation. The contention of the Railway is that since there is here no actual "interruption to interstate commerce" the United States has no right under the Commerce Clause of the United States Constitution to maintain

the suit. This distinguishes the case, the Railway says, from *Re Debs,* 158 U.S. 564, in which it was held by the Supreme Court that a strike then in existence against the railroad gave the United States standing to seek an injunction to prevent a substantial part of commerce from coming to an actual stop. The Railway further contends that the United States has no inherent power to litigate for the purpose of "protecting the jurisdiction" of the National Mediation Board, which jurisdiction is said to be endangered by FEC's alleged violations of the Railway Labor Act. The standing of the United States as an appellant here is further contested by the Railway on the theory that it was not an aggrieved party as a result of the decision of the court below.

The United States contends that its right to file the original action is threefold. It says (1) It has a right of action based upon the Commerce Clause of the Constitution to enjoin conduct which obstructs interstate commerce, under the *Debs* case; (2) it has a right of action to enforce the provisions of the Railway Labor Act, and (3) it has standing to sue in order to protect the jurisdiction of the National Mediation Board, and to aid that agency in the carrying out of its statutory functions. We think we need go no further than to hold, as we do, that the allegations of the complaint touching on the threat of obstructing interstate commerce is sufficient to bring the case within the ambit of the court's decision in *Re Debs, supra.* See also *United States* v. *City of Jackson, Mississippi,* 5th Cir. 318 F. 2d 1. Not only the allegations, but the proof adduced on the hearing for preliminary injunction, establish at least preliminarily that the actions of FEC, which we have, by our earlier decision, found to violate the Railway Labor Act, are a substantial threat to the free flow of interstate com-

merce. Moreover, as called to our attention by the United States, the Act itself in 45 U.S.C.A. 152 Tenth seems to authorize this type of proceeding by the United States. This provision is as follows:

> "The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, * * *. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof * * *."

Finding, as we do, that the United States had standing to bring the action, it follows necessarily that, having not completely prevailed in the trial court in seeking to prevent all modifications of the existing employment contracts, the United States may be considered as an aggrieved party for the purpose of filing its cross-appeal.

On the merits of the appeal both the Railway and the Government reargue much of what has already been decided by this Court in the *BRT* case, *supra,* and both formally in their briefs request a modification of the Court's decision in that case. The United States particularly while stating that the solution there was probably as equitable a one as could be devised, if any deviations at all could be recognized on account of strike conditions, nevertheless contended that under the statute no deviations were permissible. As we stated in the *BRT* case, 336 F. 2d at 181, "when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each. On the side of labor,

it is the cherished right to strike. On management, the right to operate, or at least the right to try to operate." We then stated, "But this right of self-help is not a license for wholesale abrogation of the agreement. As the term implies, it is help which is reasonably needed to meet the impasse of a railroad desiring to run and unions unwilling to furnish workers." We concluded that the manner in which this impasse could be resolved was to permit the Railway "to institute and maintain such employment practices, etc. as are, and continue to be, reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions." 336 F. 2d at 182.

We are not disposed to modify the law of the case now that the trial court has undertaken to carry out the mandate in the *BRT* case. We shall undertake to determine whether, in the case before us, the court has adequately understood and given effect to our earlier decision.

The Railway makes a major attack on the procedural steps which the trial court imposed on it, that is, forbidding it to deviate in the slightest degree from the existing employment contract "except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court * * *." The Railway contended that it should be permitted to institute the deviations and leave it to the United States or the Brotherhoods to complain to the trial court and carry the burden of proving the deviation not to be "reasonably necessary" in the strike conditions.

We think that the prior decision of this Court was so worded as to permit the trial court to adopt the procedure which it followed in entering the injunction of October 30. We think it entirely appropriate that since a departure from the employment contracts is,

as clearly stated by us in our prior opinion, the exception even during the strike it is appropriate for the burden of showing the necessity for such departure to be placed on the party claiming the privilege.

Coming finally to the specific departures permitted and forbidden by the trial court to the Railway, we note that in our earlier opinion we made the following comment: "While this appears to move the Judge from the firing line, Townsend v. Sain, 1963, 372 U.S. 293, 319, 83 Sup. Ct. 745, 9 L. Ed. 2d 770, into the locomotive cab, it is not for him to decide what to pay, etc. His task is to pass on what FEC had done or proposes to do." We think it even less appropriate for this Court itself to attempt to take the engineer's place in a locomotive cab. We know full well that the distinguished trial Judge has had a long familiarity with the Florida East Coast Railroad and its operations, and more particularly in recent years he has had much experience with its labor problems. We think that his findings and determinations with respect to the departures from the employment contract reasonably necessary under strike conditions are as much entitled to be undisturbed except upon a finding that they are clearly erroneous as are other findings of fact by a trial court sitting without a jury. We find none of his determinations in this respect to be without a substantial basis on the record as a whole to support them. We therefore decline to interfere either with these findings or with the normal discretionary power of the trial court in the granting of interlocutory orders in such a case as this.

On the appeal by the Florida East Coast Railroad Company, the judgment is AFFIRMED. On the cross-appeal of the United States, the judgment is AFFIRMED.

APPENDIX B

Filed October 30, 1964

Findings of Fact and Conclusions of Law

This cause having been heard by the Court on the Motion of the Plaintiff, the United States of America, for a preliminary injunction, the complaints of the United States of America and the intervenors, and the answer of Defendant, and the Court having received testimony and other evidence in open court and heard argument from counsel for all parties, the Court makes the following Fndings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Defendant, Florida East Coast Railway Company (FEC), is a corporation organized under the laws of the State of Florida and engaged in interstate commerce as a railroad "carrier" as defined in Section 1 of the Railway Labor Act (45 U.S.C. 151) (hereafter, the Act). It is subject to the provisions of said Act, and is classified by the Interstate Commerce Commission as a class 1 railroad. Defendant is licensed to do business and does business within the Middle Judicial District of Florida,
332 and has its principal place of business in St. Augustine, Florida.

2. Collective bargaining agreements between Defendant and the labor organizations listed in footnotes 1, 2 and 3, *infra,* have been in effect for many years governing rates of pay, rules and working

conditions of certain crafts or classes of Defendant's employees. Said collective bargaining agreements, with subsequent changes agreed to by the relevant parties, have been in effect at all times material to this suit.

3. Since January 23, 1963, the 11 labor organizations listed in footnote 1,[1] representing certain crafts or classes of FEC's non-operating employees, have been legally on strike against FEC. This dispute began on September 1, 1961, with the service of notices by the 11 organizations under Section 6 of the Act (45 U.S.C. 156) seeking a wage increase of 25 cents per hour and six months advance notice of any intended layoff or abolition of positions. FEC's counter-proposals, served on September 18, 1961, called for wage reductions of at least 20% for 39 groups of middle and lower-range employees in 6 craft groupings; for the establishment of new entry rates for 7 groups of employees in 2 crafts at 80% of existing levels,
333 with certain periodic increases; for the establishment of a flat $1.25 hourly rate for dining car waiters and other employees serving food and drinks; and for the elimination of all rules or provisions requiring more than 24 hours advance notice prior to abolition of positions of reduction of forces. This September 18, 1961, notice constitutes the outer

[1] Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway Carmen of America; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Hotel & Restaurant Employees & Bartenders' International Union; International Association of Machinists; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; Order of Railroad Telegraphers; Sheet Metal Workers' International Association.

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limits of FEC's proposals during the dispute. The FEC, however, has never attempted or proposed to implement its September 18, 1961, counter-proposals or to change existing agreements as so proposed.

4. The immediate precipitating cause of the strike was FEC's announcement on January 16, 1963 (nearly three months after the National Mediation Board had advised, on October 22, 1962, that it was terminating its services as contemplated by the Act), that all non-operating jobs would be abolished as of January 23, 1963. For a brief period after the strike began the railroad was completely shut down. On February 3, 1963, the Defendant resumed freight operations, using supervisory personnel and replacements for those employees who were not reporting for work.

5. These replacements in both the operating and non-operating crafts made individual agreements with FEC concerning their rates of pay, rules and working conditions, on terms substantially different from the collective bargaining agreements in force for the relevant crafts or classes.

6. On September 1, 1963, FEC, without filing any notice under Section 6 of the Act and without negotiation with the relevant labor organizations, unilaterally replaced the individual agreements under which
334 the replacements were working with a uniform set of rates of pay, rules and working conditions, also substantially different from the existing collective bargaining agreements. Each employee reporting for work thereafter was required to waive his rights under the existing collective bargaining agreement for his craft or class, and to agree individually by a signed receipt to accept instead FEC's new "Conditions of Employment", as they were called.

7. By August, 1963, the Defendant was performing 90.06% of the carload freight service performed in a

comparable period the preceding year; by September, 1963, the figure was 95.53%; and currently the railroad is carrying carload freight at a volume equal to or in excess of seasonally comparable pre-strike levels, and is handling all the freight traffic that is presented to it.

8. By October 1, 1963, the Defendant was operating at this near-capacity level with about 650 employees, as opposed to the approximately 2000 employees it had in comparable pre-strike periods. Its vice-president in charge of operations stated on October 1, 1963, that by that time the carrier had achieved nearly the full manpower levels required to maintain stable operations under the rates of pay, rules, and working conditions then actually in effect.

9. On September 24, 1963, FEC served a notice pursuant to Section 6 of the Act upon the 17 non-operating organizations listed in footnote 2,[2] in which
335 it proposed a new "Uniform Working Agreement", substantially the same as the September 1 Conditions of Employment and constituting a comprehensive revision of the rates of pay, rules and

[2] American Railway Supervisors Association, Inc.; American Train Dispatchers Association; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway Carmen of America; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Dining Car Employees Union; International Association of Machinists; International Association of Railway Employees; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers; Order of Railroad Telegraphers; Railroad Yardmasters of America; Sheet Metal Workers' International Association; United Transport Service Employees (Red Caps); and United Transport Service Employees (Train Porters).

working conditions contained in the governing collective bargaining agreements with the 17 organizations.

10. After a meeting between representatives of the organizations and FEC on October 18, 1963, to discuss the notice was terminated because the parties could not agree whether to confer in the presence of a court reporter, the services of the National Mediation Board were requested by the 17 organizations on October 23, 1963, in a letter with attachments which was received by the Board on October 28, 1963. The Mediation Board assumed jurisdiction, and on October 31, 1963, docketed the dispute as Case No. A-7055.

11. One of the 17 organizations, the International Association of Railway Employees (IARE), resumed negotiations on October 22, 1963, and requested that it not be included in Case No. A-7055. These negotiations terminated on December 18, 1963, and the IARE invoked the Board's services on December 26, 1963.

On January 6, 1964, the Board docketed the
336 dispute as Case No. A-7093.

12. Cases No. A-7055 and A-7093 are still pending before the National Mediation Board.

13. Nevertheless, on October 30, 1963, FEC unilaterally put into effect the new Uniform Working Agreement contained in its notice of September 24, 1963. The non-operating employees of the carrier have been since that time and are at present actually working under the rates of pay, rules, and working conditions set forth in that document. The Uniform Working Agreement is not, however, in effect as to the IARE.

14. By letter to the 17 organizations dated October 30, 1963, with copy to the National Mediation Board, FEC advised that in its view the organizations had disentitled themselves to invoke the Board's services by refusing on October 18 to confer in the presence of a court reporter.

15. Asserting that its agreements with all organizations are suspended during the pendency of a strike and that it is free to put into operation whatever rates of pay, rules, and working conditions it deems necessary to maintain operations, the Defendant FEC has stated it will revert to the September 1, 1963, Conditions of Employment or substantially similar conditions if prevented from operating under the September 24, 1963, Uniform Working Agreement.

16. Although since August, 1963, the Defendant railroad has been handling carload freight in quantities comparable to its pre-strike traffic, it has not restored less-than-carload freight or passenger
337 service, its employment has leveled off, apart from replacement of normal turnover, at approximately 850 employees; it describes the overall personnel policy which it has followed since February 3, 1963, as a "long range program" designed to achieve maximum efficiency with qualified employees. It has not been the purpose of the railroad to recruit a work force of sufficient personnel to enable it to provide full service to the public under the duly negotiated collective bargaining agreements. There is no shortage of applicants available to the Defendant FEC to expand its present manpower requirements.

17. On July 31, 1963, FEC served notice pursuant to Section 6 of the Act upon the 17 organizations listed in footnote 3,[3] in which it proposed to cancel and

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[3] American Railway Supervisors Association, Inc.; American Train Dispatchers Association; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway Carmen of America; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; International Association of Machinists; International Association of Railway Employees; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical

abolish the union shop provisions of its collective bargaining agreements with these organizations, effective September 1, 1963.

18. After a meeting between representatives of the organizations and FEC on August 29, 1963, to discuss the notice was terminated because the parties could not agree whether to confer in the presence of a court reporter, the services of the National Mediation
338 Board were requested on September 4, 1963, in a letter with attachments received by the Board, by 16 of the organizations on September 6, 1963. The Mediation Board assumed jurisdiction, and on October 11, 1963, docketed the dispute as Case No. A–7027. The matter is still pending before the Mediation Board. The American Train Dispatchers Association requested the Board's services in a separate application, which was docketed by the Board as Case No. A–7022. This matter is also still pending before the Mediation Board.

19. Nevertheless, on September 9, 1963, FEC unilaterally put into effect the proposal contained in its notice of July 31, 1963, and purported to cancel and abolish the union shop provisions of its collective bargaining agreements with the respective labor organizations. By letter dated September 13, 1963, the carrier advised the Mediation Board that in its view the organizations had forfeited their right to invoke the Board's services by refusing on August 29 to confer in the presence of a court reporter.

20. As to all non-operating crafts and classes on the FEC property which are represented by the organi-

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Workers; International Brotherhood of Firemen, Oilers, Helpers, Roundhouse & Railway Shop Laborers; Joint Council Dining Car Employees; Order of Railroad Telegraphers; Railroad Yardmasters of America; Sheet Metal Workers' International Association; United Transport Service Employees (Red Caps); and United Transport Service Employees (Train Porters).

zations set forth in footnotes 1, 2 and 3, *supra,* the FEC is presently imposing the rules, rates of pay and working conditions embodied in its Section 6 proposals of September 24, 1963, and has announced its intention, if prohibited from continuing such rules, rates of pay, and working conditions, of returning to the rules, rates of pay and working conditions set forth in its September 1, 1963, "Conditions of Employment" (which are substantially the same). These
339 presently imposed rules, rates of pay, and working conditions are materially different from the existing collective bargaining agreements in effect between the FEC and the organizations representing such crafts and classes of employees.

CONCLUSIONS OF LAW

(1) This Court has jurisdiction of the subject matter of this suit and of the parties. The jurisdiction of this Court to grant an injunction exists under 28 U.S.C. 1345, 1331, and 1337.

(2) The United States has standing to maintain this action. *In re Debs,* 158 U.S. 564, 584, 586 (1895).

(3) The disputes as to rates of pay, rules, and working conditions involving the FEC's Section 6 notices of July 31, 1963, and September 24, 1963, and involving the institution by the FEC on September 1, 1963, of the "Conditions of Employment" and involving the negotiation of individual employment contracts on a wholesale basis during the period of February 3, 1963, to September 1, 1963, are "major" disputes within the meaning of the Railway Labor Act. *Elgin, J. & E. R. Co.* v. *Burley,* 325 U.S. 711, 722–724 (1945); *Florida East Coast Railway Co.* v. *Brotherhood of Railroad Trainmen, AFL–CIO* (C.A. 5, No. 21356, August 18, 1964), —— F. 2d ——.

(4) The labor organizations listed in footnotes 2 and 3, *supra*, made a timely and proper invocation of the services of the National Mediation Board as
340 to both the notice of July 31, 1963, and the notice of September 24, 1963.

(5) FEC's purported effectuation of the proposals contained in the notices of July 31, 1963, and September 24, 1963, before mediation could be commenced, violated Sections 2, Seventh; 5, First; and 6 of the Railway Labor Act (45 U.S.C. 152, Seventh, 155, First, 156), and frustrated the purpose manifested in the Act to provide for orderly settlement of "major" disputes involving proposed changes in rates of pay, rules, and working conditions. *Florida East Coast Railway Co.* v. *Brotherhood of Railroad Trainmen, AFL–CIO, supra.*

(6) The institution, without pretense of compliance with any of the procedures of Section 6 of the Act, of wholesale changes in rates of pay, rules, and working conditions by the FEC on September 1, 1963, by the promulgation and purported effectuation of the "Conditions of Employment", for which each individual employee was made to sign a receipt agreeing to waive his rights under the existing collective bargaining argeement as to his craft or class and agreeing to accept instead said "Conditions of Employment", violated Sections 2, First, Second, Seventh; and Section 5, First; and Section 6 of the Railway Labor Act (45 U.S.C. 152, First, Second, Seventh, 155, First, and 156).

(7) FEC's exaction of individual agreements by its replacement employees during the period February 3, 1963, to September 1, 1963, on term as to rates of pay, rules, and working conditions substantially different from the collective bargaining agreements in
341 force for the relevant crafts or classes of em-

ployees without the issuance of a Section 6 notice or with any of the procedures of Section 6 and without pretense at compliance with the Act, violated the Act's implied prohibition against bargaining with individual employees as to matters which are the subject of collective bargaining and violated Sections 2, First, Second, Seventh, and Section 5, First, and Section 6 of the Railway Labor Act (45 U.S.C. 152, First, Second, Seventh, 155, First, and 156).

(8) Injunctive relief to restore the status quo ante is proper in these circumstances to insure that the processes of mediation and negotiation can be carried on in the atmosphere of stability contemplated by the Act and in order to prevent the frustration of the statutory mechanism for orderly settlement of major disputes.

(9) The Norris-LaGuardia Act, 29 U.S.C. 101, et seq., is no bar to injunctive relief in the present circumstances to enforce the mandates of the Railway Labor Act.

(10) The fact that a strike is in progress on the FEC does not justify the wholesale abrogation of existing collective bargaining agreements, but does afford the Defendant FEC, on appropriate application to this Court therefor and evidentiary showing in support thereof, the right to make such changes in existing rules and working conditions as are reasonably necessary in order for the FEC to continue to operate during the strike. Any such changes as the FEC contends are justified by this exception must be presented to this Court on an item-by-item
342 basis for review and determination hereafter.

(11) FEC's actions in violation of the Act as found hereinabove threaten irreparable injury to the public interest and to the rights of intervenors and employees of Defendant FEC under the Railway

Labor Act for which there is no adequate remedy at law.

(12) Plaintiff, United States of America, and intervenors are entitled to a preliminary injunction restoring the status quo ante until further Order of this Court. Since said preliminary injunction will issue upon the application of the United States, no requirement need be made for security. (See Rule 65, F.R. Civ. P.)

BRYAN SIMPSON
Chief Judge,
U.S. District Court

Jacksonville, Florida
October 30, 1964.

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343 Filed Oct. 30, 1964

PRELIMINARY INJUNCTION

This matter coming on to be heard on the Motion of the Plaintiff, the United States of America, for a preliminary injunction, the complaints of the United States of America and intervenors, and the answer of Defendant; and,

Each of the parties being represented by counsel and the Court having received testimony and other evidence and heard argument of counsel in light of the record before it; and the Court having made Findings of Fact and Conclusions of Law which are filed herewith, it is

ORDERED, ADJUDGED AND DECREED:

1. That the Defendant, Florida East Coast Railway Company (FEC), its officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, are enjoined and restrained, until further Order of this Court, from:

(a) in any manner continuing in effect or implementing in any respect the change in rates of pay, rules or working conditions announced in
344 FEC's notices of September 24, 1963, and July 31, 1963, except by agreement with the labor organizations representing the several crafts or classes of FEC's employees affected by said notices, or until the controversies have been finally acted upon by the National Mediation Board, as provided in Sections 5 and 6 of the Railway Labor Act (45 U.S.C. 155, 156);

(b) taking any action under any further notice attempting to make changes in rates of pay, rules or working conditions, except in accordance with the procedures of Section 6 of the Railway Labor Act (45 U.S.C. 156);

(c) in any manner continuing in effect or taking any action under FEC's "Conditions of Employment" promulgated September 1, 1963, except by agreement with the labor organizations representing the several crafts or classes of FEC's employees;

(d) making or continuing in effect any individual agreements with FEC's employees in any craft or class for which a collective bargaining representative has been designated, except in accordance with the provisions of the collective bargaining agreement for said craft or class; or

(e) making any other changes in rates of pay, rules or working conditions of its employees in crafts or classes covered by existing collective bargaining agreements except in accordance with the procedures of the Railway Labor Act or except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC
345 to this Court during the pendency of the current strike.

2. The Defendant Florida East Coast Railway Company (FEC), its officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, are further mandatorily required and directed, until further Order of this Court,

(a) to revoke, cancel and annul all action taken and notices given purporting to put into effect the change in rates of pay, rules and working conditions proposed in FEC's notices of July 31, 1963, and September 24, 1963, and in its "Conditions of Employment" of September 1, 1963;

(b) to reinstate and maintain the rates of pay, rules, and working conditions as embodied in existing collective bargaining agreements covering its employees until and unless said agreements are modified in accordance with the procedures of the Railway Labor Act or until and unless specifically authorized on application therefor by this Court; and

(c) to bargain in good faith with the labor organizations representing the crafts or classes of FEC's employees.

3. In order to permit the Defendant to make necessary changes and adjustments in its operations, the injunctive provisions of numbered Paragraphs 1 and 2 hereof shall become effective fourteen (14) days after the entry thereof.

DONE AND ORDERED at Jacksonville, Florida,
346 this 30th day of October, 1964.

BRYAN SIMPSON
Chief Judge, U.S. District Court

* * * * *

384 Filed Dec. 3, 1964

ORDER

This cause having come on for further hearing on the Application of Defendant for Approval of Employment Practices pursuant to Paragraph 1(e) of the Preliminary Injunction entered herein on October 30, 1964; and the Court having received testimony and other evidence in open court and heard argument of counsel, the Court finds that in order to enable the Defendant to effectuate its right of self help during the strike which has been in progress since January 23, 1963, certain departure from the collective bargaining agreements presently in force on Defendant's property, as hereinafter set forth, are reasonably necessary; and further finds that there is no showing of reasonable necessity for departure from said collective bargaining agreements in any other respect; and it is, therefore,

ORDERED:

1. Defendant's request that it shall not be deemed in violation of any existing collective bargaining agreement for failure to observe craft or seniority
385 district restrictions, is denied.

2. Defendant's request that it shall not be deemed in violation of any existing collective bargaining agreement by requiring or permitting supervisors to perform craft work, is denied, except that until March 31, 1965, Defendant may man the positions of one Train Dispatcher and two Rate and Division Clerks with supervisory personnel, and that Defendant may thereafter continue this practice only upon a showing of reasonable necessity.

3. Defendant's request that it shall not be deemed in violation of any existing collective bargaining

agreement by exceeding the apprentice and/or trainee ratios or maximum age limitations contained in any such agreement, is granted.

4. Defendant's request that it shall not be deemed in violation of any existing collective bargaining agreement by permitting or requiring non-exempt foremen to perform scope work of the craft they supervise, is denied.

5. Defendant's request that it shall not be deemed in violation of any existing agreement, by virtue of the contracting out of work which it does not have personnel available to perform, is denied except that it may continue to contract out work in areas where it is presently doing so, as shown in this record, to-wit: the performance of the work of one Bridge Maintenance and Repair Gang and installation and maintenance of the Centralized Traffic Control System.

6. Defendant's request to perform the work
386 of Bridge Tender by supervisory or contract employees during the continuance of the strike, is denied except that Defendant may continue to use supervisory or contract employees in the position of Bridge Tender until March 31, 1965.

7. Defendant's request that its obligation to furnish seniority rosters be conditioned upon an Order subjecting the General Chairman, or other designated official requesting such lists, to sanctions for contempt in the event of their misuse, is denied.

8. Defendant's request that the union shop provisions of each collective bargaining agreement be declared void and unenforceable as to new employees hired since January 23, 1963, is denied; and it is

FURTHER ORDERED that Defendant shall have to and including December 10, 1964, in which to bring itself into full compliance with this Court's Preliminary Injunction of October 30, 1964, and this Order.

DONE AND ORDERED at Jacksonville, Florida, this 3rd day of December, 1964.

BRYAN SIMPSON
Chief Judge
United States District Court

APPENDIX C

In the United States Court of Appeals for the Fifth Circuit

No. 21356

FLORIDA EAST COAST RAILWAY COMPANY, A CORPORATION, APPELLANT

v.

BROTHERHOOD OF RAILROAD TRAINMEN, AFL–CIO, APPELLEE

Appeal from the United States District Court for the Middle District of Florida

(August 18, 1964)

Before TUTTLE, Chief Judge, BROWN, Circuit Judge, and BREWSTER, District Judge

BROWN, Circuit Judge: Florida East Coast appeals from the grant of a preliminary injunction[1] which restrains it from operating under working conditions different from those contained in its agreement with the Brotherhood of Railroad Trainmen, the bargain-

[1] The injunction was stayed by this Court on March 17, 1964, after argument of counsel and exchange of briefs.

ing representative of FEC's employees in the crafts of trainmen and yardmen.[2] The primary question presented is to what extent, if at all, is a Carrier faced with strike conditions free to institute changes affecting rates of pay, rules, or working conditions without complying with the procedures provided in § 6 of the Railway Labor Act?[3]

The unusual importance of the facts giving rise to this controversy requires that we state them in some detail.

THE NOVEMBER 2, 1959 NOTICE

On November 2, 1959, FEC, along with the other 200-odd Class I Carriers in the United States, issued two notices pursuant to § 6 to its operating organizations, including BRT. One related to "Consist of Crews," the other, to "Basis of Pay and Assignment of Employees." Conferences between individual carriers and the operating organizations failed to produce agreement, and negotiations on a national level were begun.[4] The national negotiations of the November 2, 1959 notice likewise did not produce agreement, and in October of 1960, the Organizations[5] and the Carriers agreed to the creation of a Presidential Railroad Commission which was to investigate and

[2] These are so-called "operating crafts"; that is, the crafts of employees whose work involves the actual operations of the trains.

[3] 45 USCA § 156.

[4] The FEC executed a power of attorney to the Southeastern Carriers Conference Committee for the purposes of representation in the joint national negotiations.

[5] In addition to the BRT, the labor organizations representing operating crafts which were engaged in the national negotiations were Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, and Switchmen's Union of North America.

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report on the controversy, using its "best efforts, by mediation, to bring about an amicable settlement * * *."[6] On February, 28, 1962, the report of the Commission[7] was delivered to the President. National conferences on the remaining unsettled issues resumed on April 2, 1962, and continued through May 17. These conferences did not result in agreement, and on May 21 the Organizations applied for the mediation services of the National Mediation Board pursuant to § 5 of the Act. After numerous meetings[8] had been held under the auspices of the Board without agreement being reached, the Board on July 16, 1962, terminated its services.[9] The Carriers then served notice that they intended to put the November 2, 1959, notice into effect,[10] and the Organizations and Carriers began the litigation which was to culminate in the Supreme Court holding that the stat-

[6] *Brotherhood of Loc. Eng.* v. *B. & O. R.R.*, 1963, 372 U.S. 284, 286, 83 S. Ct. 691, 9 L. Ed. 2d 759. This case contains much background information regarding the national handling of the November 2, 1959 notice, and has been freely relied upon to place the events of record in proper context.

[7] The Commission was created by Executive Order 10891 in November 1960, and its members were appointed in December of that year. The parties had agreed that the proceedings of the Commission were to be accepted "as in lieu of the mediation and emergency board procedures provided by * * *" §§ 5 and 10 of the Act.

[8] Between May 25 and June 22, approximately 32 meetings were held.

[9] The Organizations refused to submit the dispute to arbitration.

[10] The first notice was actually issued on July 17. The Organizations filed suit alleging that the rule changes encompassed by the July 17 notice of intent would violate the Act. Subsequently, with leave of Court and without objection by the Organizations, the Carriers withdrew the July 17 notice and substituted therefor the November 2, 1959 notices, the changes to become effective on August 16.

utory procedures having been exhausted, the November 2, 1959, notices could be put in effect subject only to the invocation of a § 10 Emergency Board. *Brotherhood of Loc. Eng.* v. *B. & O. R.R.*, 1963, 372 U.S. 284, 83 S. Ct. 691, 9 L. Ed. 2d 759.

While the *B. & O.* case was making its tortuous way to the Supreme Court, things were happening back at the FEC yard. On January 23, 1963, 11 cooperating, non-operating labor organizations [11] representing certain FEC employees went out on strike over a wage demand as to which all parties concede the procedures of § 6 had been exhausted. The BRT did not issue a strike notice, but its members honored the picket lines of the non-operating organizations and consequently did not report for work. Eleven days later, on February 3, 1963, FEC resumed operations by utilizing supervisory personnel and some replacement workers. It is uncontradicted on this record that replacements utilized in the trainmen and yardmen crafts were worked under conditions which differed from those provided by the collective bargaining agreement then in effect betwen FEC and the BRT.[12]

Then on March 4, 1963, the *B. & O.* decision came

[11] The organizations are International Association of Machinists; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; Sheet Metal Workers International Association; International Brotherhood of Electrical Workers; Brotherhood of Railway Carmen of America; International Brotherhood of Firemen and Oilers; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Brotherhood of Maintenance of Way Employees; The Order of Railroad Telegraphers; Brotherhood of Railroad Signalmen; and Hotel and Restaurant Employees and Bartenders.

[12] The exact terms of employment of the replacement workers need not here be detailed. It suffices to say here that the conditions under which they worked from February 3, 1963, also differed from the conditions as set out in the No-

down, and on March 12, 1963, the FEC withdrew authority from the Southeastern Carriers Conference Committee to negotiate for it the November 2, 1959, notice. The formal mandate of the Supreme Court in the *B. & O.* case was received in the District Court in Illinois on April 2, 1963, and on that day the National Railway Labor Conference sent a telegram to the National Mediation Board advising that the District Court upon receipt of the mandate had dissolved the injunction straining the Carriers from making the November 2, 1959, changes effective, and that the Carriers proposed to make them effective on April 8. On the same day, April 2, FEC advised its operating Organizations including BRT that it proposed to make the November 2, 1959, notices effective on April 3. Likewise on April 2, the Mediation Board certified by letter to the President the existence of an emergency and recommended the appointment of an Emergency Board under § 10. On April 3, Emergency Board No. 154 was created.

Meanwhile, apparently on receipt of FEC's April 2 letter, the BRT issued a strike notice effective April 5. This occasioned no change in FEC's operations since FEC had been struck by the non-operating crafts since January 23, 1963, and during all this time the BRT had honored the picket lines. However, the United States was convinced that FEC could not place the notice into effect until the Emergency Board had finished its investigation of the dispute and the 30-day waiting period provided in § 10 had expired.[13] The United States was successful on May 7, 1963, in

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vember 2, 1959, notice but were substantially identical to those formally reduced to writing on September 1, 1963, which are discussed *infra*.

[13] This would put the FEC on a par with the other Carriers which participated in the national handling of the dispute.

obtaining an injunction to that effect. *United States* v. *Florida East Coast Ry.*, D.D.C., 1963, 221 F. Supp. 325.[14] Emergency Board No. 154 reported on May 13, 1963, and the 30-day waiting period subsequently expired. The FEC and the other Carriers were then free for the first time to put the November 2, 1959, notices into effect.

That is precisely what FEC did. On July 8, 1963, it issued a formal notice to the operating Organizations, including BRT, that on July 10, 1963, the November 2, 1959 notices would be put into effect. The BRT again issued a formal strike notice,[15] but—as in April—this did not change the operating situation since the BRT was still refusing to cross the picket lines of the nonoperating crafts who were still out on strike. Consequently, the November 2, 1959, notice was formally [16] in effect as of July 10, 1963.

Then on August 23, 1963, Congress passed Public Law 88-108,[17] which among other things prohibited Carriers which had served the November 2, 1959, notice from unilaterally making changes in "rates of pay, rules, or working conditions encompassed by * * * such" notice and ordered that action of the sort

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[14] The injunction was conditioned upon FEC's being allowed to participate fully in the proceedings before the Emergency Board.

[15] The BRT had voluntarily withdrawn the April strike notice upon the issuance of the injunction in *United States* v. *Florida East Coast Ry.*, D.D.C., 1963, 221 F. Supp. 325.

[16] The word "formally" is used repeatedly for one simple reason. The FEC has never operated under the November 2, 1959, rules. At all times pertinent to this suit subsequent to January 23, 1963, the FEC has operated under conditions which differ from both the collective bargaining agreement as it existed prior to November 2, 1959, and the agreement as it would be constituted after amendment by the November 2, 1959 notice.

[17] Act of August 23, 1963, 77 Stat. 129.

prohibited which had already been taken be rescinded, and "the status existing" immediately prior to such action restored." It further provided that two of the issues encompassed by the November 2, 1959 notice were submitted to binding arbitration [18] and set up the procedure for accomplishing that arbitration. In response to the request of Secretary of Labor Wirtz, the FEC withdrew November 2, 1959, rules which it had formally put into effect on July 10, for the life of Public Law 88–108. When 88–108 expired by its own terms on February 24, 1964, four days before the hearing in the District Court which resulted in the March 2, 1964, preliminary injunction appealed from, the FEC again placed the November 2, 1959, notice formally into effect.[19] This brings us to date with respect to the November 2, 1959, notice. But meanwhile, other things were happening.

The Union Shop Notice

On July 31, 1963, the FEC issued a new § 6 notice to the BRT that it proposed to cancel the union shop provision of the collective bargaining agreement. Representatives of the FEC and BRT assembled at the Monson Hotel in St. Augustine, Florida, on August 29, 1963, but the conference never began. The

[18] The portions submitted to binding arbitration were those identified as "use of Firemen (Helpers) on Other Than Steam Power," "Consist of Road and Yard Crews," and certain portions of the Organizations' September 7, 1960, notice relating to the same subject matter. These matters have been settled by agreement of the FEC and its operating Organizations and are not here involved.

[19] The notice letter to BRT of February 24, 1964, stated that the 1959 notice would be placed into effect at 12:01 a.m., Tuesday, February 25, 1964. As indicated previously, other settlement had been made of the "Firemen" and "Crew Consist" issues (see note 18, *supra*), and these portions of the November 2, 1959, notice were excepted from the terms of the letter.

FEC insisted on having a Court Reporter present to record the meeting, and the BRT refused to negotiate under such circumstances. Consequently, on September 4, the BRT requested the services of the National Mediation Board. The Board accepted the case, and it was docketed the same day as NMB A–7026. On September 9, the FEC received a letter from the National Mediation Board informing that the matter had been docketed. However, earlier that same day (September 9, 1963), the FEC had written the BRT to say that the conference having been ineffectual and the services of the Mediation Board not having (to its knowledge) been invoked, it was putting the July 31, 1963, notice abolishing the Union Shop into effect. The Union Shop portion of the collective bargaining agreement has not been honored since that date although the matter still pends before the Mediation Board.

THE SEPTEMBER 25, 1963 NOTICE

As we indicated in the preceding statement, the FEC has operated since February 3, 1963, under conditions of employment that differ from both the pre-1959 collective bargaining agreement and the agreement as it would be amended by the November 2, 1959, notice. Those actual operating conditions were formally reduced to writing on September 1, 1963, and all employees hired to work in the trainmen and yardmen crafts since that date have been required to sign a copy of this formal promulgation called by FEC "Conditions of Employment." Then on September 25, 1963, the FEC served a § 6 notice which proposes to amend the collective bargaining agreement to provide rates of pay, rules, and working conditions which all concede are substantially identical to those embodied formally in the "Conditions of Employment" and followed in actual practice since Feb-

ruary 3, 1963. On October 30, 1963, the FEC resumed conferences on the November 2, 1959, and the September 25, 1963, notices, discussing the November 2, 1959, notice first. On November 1, 1963, the discussion of the September 25, 1963, notice continued. The parties were still discussing this notice on February 28, 1964, the date of the hearing on BRT's motion for preliminary injunction.

The position of the BRT and the United States as *amicus curiae,* simply stated, is that the FEC has instituted changes in rates of pay, rules, and working conditions without following procedures made mandatory by the Act. They further urge that the injunction was necessary in order to prevent a subversion of the statutory procedures.

The FEC, on the other hand, contends that the complaint of the BRT is that the bargaining agreement is not being complied with. Such complaints, it urges, are "minor disputes" within the exclusive jurisdiction of the Railroad Adjustment Board. It further asserts that whatever the nature of the dispute, major or minor, it is justified by "strike conditions" in operating under the working conditions it has imposed. This is true, it says, despite the fact that the conditions are different from both the pre-1959 agreement and the agreement as it would be constituted after amendment by the November 2, 1959, notice. And, the argument continues, this is so even though the working conditions are substantially identical with the proposal of September 25, 1963, which is presently being discussed by it and the BRT because these are "temporary conditions imposed by strike" and not permanent prospective changes of the "agreement."

First, we think that this is clearly a so-called "major dispute" within the meaning of the decisions

of the Supreme Court and this Court. *Elgin, Joliet & Eastern Ry.* v. *Burley,* 1945, 325 U.S. 711, 723–25, 65 S. Ct. 1282, 89 L. Ed. 1886; *Order of Railroad Telegraphers* v. *Chicago & N.W. Ry.,* 1960, 362 U.S. 330, 341, 80 S. Ct. 761, 4 L. Ed. 2d 774; *Missouri-Kansas-Texas R.R.* v. *Brotherhood of Locomotive Engineers,* 5 Cir., 1955, 266 F. 2d 335; *St. Louis, San Francisco & T. Ry.* v. *Railroad Yardmasters of America,* 5 Cir., 1964, 328 F. 2d 749; *Aaxico Airlines, Inc.* v. *Air Lines Pilots Ass'n International,* 5 Cir., 1964, 331 F. 2d 433. This is not a case like *Missouri-Kansas-Texas, Frisco, or Aaxico* involving a dispute as to whether the agreement authorizes action taken by the Carrier. Neither is it a case involving a dispute over the meaning of the terms relating to rates of pay, hours, and working conditions. Rather, this is a case in which a Carrier has unilaterally instituted wholesale changes in these terms, changes which, in the negotiations presently going on with respect to the September 25 notice, it seeks to establish permanently. The bulk of the changes were instituted on February 3, 1963, with no pretense at compliance with the Act. Although FEC did serve the July 31, 1963, notice of intent to cancel the Union Shop agreement, the cancellation was formally effected on Septemper 9, 1963, while the matter was pending before the National Mediation Board.[20] Employees hired after September 1, 1963, were made to sign the "Conditions of Employment" which formally reduced to writing the changes of February 3, 1963. Again, this was done with no pretense of compliance with the Act. Finally on September 25, 1963, the FEC served

[20] There is no merit to the contention of the FEC that the services of the Mediation Board were not properly invoked because FEC did not receive notice of the invocation within ten days. The Act merely requires that the services be invoked within ten days, as was done here.

a § 6 notice with respect to those changes. Whether the strike conditions do justify the changes in whole or in part is admittedly a difficult question, but neither the presence of the question nor its difficulty changes the character of the dispute from "major" to "minor." [21] In short, the controversy is not over what the bargaining contract now permits as a matter of contract construction. The dispute is over the steps FEC can take to extricate itself from the consequences of a strike or other refusal by BRT to supply manpower.

Second, it is equally clear that if this were the ordinary situation of a Carrier not faced with "strike conditions," [22] the institution of wholesale changes of the sort here involved would be enjoinable by the District Court pending exhaustion of the procedures of the Act. E.g., *Manning* v. *American Airlines*, 2 Cir., 1964, 329 F. 2d 32; *R.R. Yardmasters* v. *Pennsylvania R.R.*, 3 Cir., 1955, 224 F. 2d 226; *Railway Employees' Co-op* v. *Atlanta B. & C.R.R.*, D. Ga., 1938, 22 F. Supp. 510; *Chicago & W.I.R.R.* v. *Brotherhood of Ry. & S.S.*

[21] The fact that the Union Shop and 1949 agreements are still legally "existing" does not convert this into a "minor dispute." Agreements in the railroad industry do not cease to be effective until they are changed in accordance with the Railway Labor Act. As the United States observes, this emphasis on the "'existence of the agreements' is thus a non sequitur."

[22] We do not find it necessary to resolve the controversy waged both in the District Court and here as to whether the BRT was actually "on strike" from January 23, 1963, to the date of hearing in the District Court. Although the BRT was formally on strike for only two short periods during that time, it is uncontradicted that its members honored the picket lines of the non-operating Organizations and did not work and would not until the non-operating strike was terminated. For the purposes of this decision, whatever this might be called we hold that FEC was faced with "strike conditions" from the refusal of BRT to perform essential work.

Clerks, N.D. Ill., 1963, 221 F. Supp. 561; *Monon* v. *Brotherhood of R.R. Trainmen,* N.D. Ill., 1963, 215 F. Supp. 430.[23] The rationale of these decisions is a simple one. Under the structure of the Act, changes "in agreements affecting rates of pay, rules, or working conditions * * *" may be instituted unilaterally only after notice, negotiation and mediation (if requested) and action by the Presidential Emergency Board if convened under § 10. In order to insure that the purpose manifested in the Act to provide for orderly settlement of "all disputes" not be frustrated, the status quo must be preserved pending the exhaustion of the statutory procedures. Bargaining is a sham if a Carrier has already done in fact what it formally seeks to do in negotiation of a § 6 notice.

But that is precisely what FEC asserts it may do here. With formal negotiations in progress under the September 25, 1963, notice, the argument of FEC that the changes which all parties agree are substantially identical to those embodied in the notice are only temporary (for the duration of the strike) is plainly specious. Through the means of the "Conditions of Employment" which all must sign, it has in fact instituted rates of pay, rules and working conditions over which it is presently bargaining under the procedures

[23] We thus agree with the position of the United States as amicus curiae that the Norris LaGuardia Act, 29 USCA § 101, does not bar enforcement of the mandate of the Railway Labor Act. *Virginia Ry.* v. *System Federation,* 1937, 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789; *Graham* v. *Brotherhood of Firemen,* 1949, 338 U.S. 232, 70 S. Ct. 14, 94 L. Ed. 22; compare *Textile Workers* v. *Lincoln Mills,* 1957, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972; *Telegraphers* v. *Chicago & N.W. Ry.,* 1960, 362 U.S. 330, 80 S. Ct. 761, 4 L. Ed. 2d 774. Today, as in 1930, the mandates of the Railway Labor Act are enforceable by injunctive decree. *Texas & N.O.R.R.* v. *Railway Clerks,* 1930, 281 U.S. 548, 50 S. Ct. 427, 74 L. Ed. 1034.

of the Act. This it cannot do, and the fact that the changes in actual operations were instituted prior to the § 6 notice can make no difference. In both *Manning* v. *American Airlines,* 2 Cir., 1964, 329 F. 2d 32, and *Chicago & W.I.R.R.* v. *Brotherhood of Ry. & S.S. Clerks,* N.D. Ill., 1963, 221 F. Supp. 561, injunctions were issued against changes which had already been instituted prior to suit.

The strike conditions, however, do have relevance to the proper solution of the problem at hand. Opposed both by the BRT and the United States, FEC urges that the collective bargaining agreement is wholly suspended during the strike and that any other holding will make it impossible to avail itself of its right to continue its business during the strike. It is clear that the suspension argument has no merit. The BRT is still the bargaining representative of all the employees in the crafts of trainmen and yardmen whether union members or not. *Steele* v. *L. & N.R.R.,* 1944, 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173. The employees of FEC are entitled to the benefit of the terms of the agreement, and the FEC may not supersede the agreement by individual contracts, whether consented to by the employees or not. *Telegraphers* v. *Ry. Express Agency,* 1944, 321 U.S. 342, 346, 64 S. Ct. 582, 88 L. Ed. 788.[24]

But the case does not turn on the question of sus-

[24] This case adopted for the Railway Labor Act the classic statement of the rule first announced in *J. I. Case Co.* v. *NLRB,* 1944, 321 U.S. 332, 336, 64 S. Ct. 576, 88 L. Ed. 762:

> "[H]owever engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits * * *."

pension. Rather, it is a problem of what the law permits when the protagonists have exhausted all of the elaborate governmental machinery for the settlement of a dispute, and neither is willing to budge. That is the situation here. There is an actual strike against FEC by the non-operating Unions. The continuation of the strike by such employees is legal. So, too, is the effort of FEC to operate. But as a result of this strike, BRT declines to supply the craft workers as its contract calls for. So far as FEC's need for these crafts and BRT's failure to supply them, there is no requirement, or provision, for this impasse being resolved under the machinery of the Railway Labor Act. Nothing in the Act forces either compulsory arbitration or acquiescence. At that juncture, what the Act recognizes is that each party is free lawfully to employ self-help. The Supreme Court in this very controversy made that plain. In its decision of March 4, 1963,[25] it stated:

> "* * * What is clear * * * is that both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute * * *."

See also, *Order of Railway Conductors* v. *L. & N. R.R.*, 1964, —— F. 2d —— [No. 20714, April 20, 1964].

Indeed, the unquestioned right to resort to self-help is the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration. Cf. *NLRB* v. *Radio & Television Broadcast Eng'rs, Local 1212*, 1961, 364 U.S. 573, 81 S. Ct. 330, 5 L. Ed. 2d 302. That the occasions for resort to this raw power will be rare under a system which hedges in disputes by elaborate negotiations, media-

[25] *Brotherhood of Locomotive Engineers* v. *B. & O. R. Co.*, 1963, 372 U.S. 284, 291, 83 S. Ct. 691, 9 L. Ed. 2d 759.

tion and Presidential fact finding machinery does not deny either the existence of the power, or the present policy determination that, awesome as is its prospect, it is the only way to preserve the last vestige of free contracts, freely made.

Since the right surely exists, the law must accommodate itself to the exercise of this power in a way that will make it effectual. *Brotherhood of Railroad Trainmen* v. *Chicago R. & I.R.R.*, 1957, 353 U.S. 30, 40, 77 S. Ct. 635, 1 L. Ed. 2d 622. Anything less either temporizes with the so-far-determined policy against compulsory arbitration, or puts the full weight of law on the side of the employees by making it impossible for the Railroad to carry on save on the terms and conditions imposed by the organized employees who now refuse to perform as agreed.

To be sure, the law gives much power to organized labor. It discourages, on every hand, industrial and railroad labor strife, walkouts, lockouts, and strikes. But when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each. On the side of labor, it is the cherished right to strike. On management, the right to operate, or at least the right to try to operate.

This policy is reflected, for example, under the National Labor Relations Act, by decisions such as *NLRB* v. *Mackay Radio & Telegraph Co.*, 1938, 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381; *NLRB* v. *Erie Resistor Corp.*, 1963, 373 U.S. 221, 83 S. Ct. 1139, 10 L. Ed. 2d 308; and *Redwing Carriers, Inc.*, 1962, 137 NLRB 1545, affirmed sub nom. *Teamsters, Local No. 79* v. *NLRB*, D.C. Cir., 1963, 325 F. 2d 1011. The consequences of self-help are not necessarily confined to the period of strife. Thus, as *Mackay Radio* and *Erie Resistor* clearly held, an employer may operate

his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers." 373 U.S. 221, at 232.

These principles are clearly applicable here. Indeed, the BRT has recognized that where, for example, sufficient crews are not available to maintain the contract structure forbidding road crews from operating trains through terminals, this requirement need not be met. They also concede that supervisory personnel may be used and that as respects the Union Shop agreement, it is not a violation of the agreement or of the Railway Labor Act for FEC to hire and pay non-union replacements. As a corollary, BRT concedes that FEC has no obligation to fire any such replacement at least until union membership has been declined by him.

But this right of self-help is not a license for wholesale abrogation of the agreement. As the term implies, it is help which is reasonably needed to meet the impasse of a railroad desiring to run and unions unwilling to furnish workers. Some of the practices followed by FEC indicate the nature of the problem and this limitation on self-help. Thus, for example, it is uncontradicted on this record that in order to earn pay for eight hours work, employees must now be on duty for eight and one-half hours (30 minutes for lunch), whereas under the 1949 agreement, eight hours pay was earned by seven hours and 40 minutes work (20 minutes for lunch), or a total of eight hours on-duty time. Likewise, many jobs have been reclassified to six-day rather than five-day, thus avoiding payment of overtime, the practice apparently being to pay overtime only when an employee works a greater number of days than his job description calls for. The duties of switchmen and other yard employees have also been materially changed.

Although we do not here decide what changes may be reasonably necessary in light of the strike conditions, we hold that in a situation of this sort, it falls to the lot of the District Judge to pass on which changes are in fact necessary in order for FEC to continue to operate. Without placing it in terms of burden of proof and the like, we think it clear that in order for the District Judge to allow FEC to escape the ban on institution of changes pending exhaustion of the statutory procedures recognized by the decisions,[26] he must be convinced that in order to make a meaningful reality of FEC's right to continue to operate, the changes are reasonably necessary. While this appears to move the Judge from the firing line, *Townsend* v. *Sain*, 1963, 372 U.S. 293, 319, 83 S. Ct. 745, 9 L. Ed. 2d 770, into the locomotive cab, it is not for him to decide what to pay, etc. His task is to pass on what FEC has done or proposes to do.

Finally, one last matter must be disposed of. The District Court held that the notice of September 25, 1963, superseded the prior November 2, 1959, notice. We think there is nothing either in the timing or intrinsic content of the September 25 notice in relation to the November 1959 notice, or in *Brotherhood of Locomotive Fire & Eng.* v. *Southern Ry.*, D.D.C., 1963, 217 F. Supp. 58, urged forcefully by BRT and cited by the District Judge to support this view.[27] The parties bargained about each of the notices separately, though both were simultaneously pending for a period of time. Furthermore, it is apparent that the Car-

[26] See cases cited in text accompanying note 23, *supra*.

[27] The decision of the same Court in *United States* v. *Florida East Coast Ry.*, M.D. Fla., 1964 —— F. Supp. —— [55 LRRM 2798], is not to the contrary. That case represents legitimate concern for the maintenance of the status quo pending the expiration of Public Law 88–108.

riers and Organizations as a matter of practice treat each notice independently. *Monon R.R.* v. *Brotherhood of Railroad Trainmen,* N.D.Ill., 1963, 215 F. Supp. 430; *Pullman Co.* v. *Order of Ry. Conductors,* 7 Cir., 1963, 316 F. 2d 556. The November 2, 1959, notice was not superseded by the September 25, 1963, notice. *Order of Railway Conductors* v. *Louisville & Nashville R.R.,* 1964, —— F. 2d —— [No. 20,714, April 20, 1964].

We restate. The FEC is free to operate under the 1949 collective bargaining agreement as amended by the November 2, 1959, notice, but FEC may not institute changes in rates of pay, rules and working conditions encompassed by the July 31, 1963,[28] and September 25, 1963, notices until the statutory procedures are exhausted. To do so would be to frustrate the statutory mechanism for orderly settlement of major disputes. This portion of the District Court's holding is clearly correct. It is, however, free to institute and maintain such employment practices, etc. as are, and continue to be, reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions. We do not express any opinion as to the outcome of the District Judge's examination of proposed changes under the select, item-by-item approach that we articulate. However, since he has enjoined the FEC from operating under any terms except those embodied in the pre-November 2, 1959, agreement, we think the most rational approach is to continue our stay of March 17, 1964, until the District Court has an opportunity to consider the nature and

[28] We need not here decide whether under applicable precedent, the FEC's insistence on the presence of a reporter at the Monson Hotel bargaining session constituted a refusal to bargain. It is clear that until the Mediation Board disposes of this matter, FEC must comply with the Union Shop agreement.

scope of the orders to be entered consistent with this opinion. As soon as the District Judge takes hold of the case, our stay will automatically expire.

AFFIRMED IN PART.
REVERSED AND REMANDED IN PART.

APPENDIX D

The Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. 151, *et seq.*, provides:

45 U.S.C. 151a. General purposes.

> The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

* * * * *

45 U.S.C. 152. General duties.

> *First. Duty of carriers and employees to settle disputes.*
>
> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation

of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives.

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * * *

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden.

No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

* * * * *

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections.

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the

representative of the craft or class for the purposes of this chapter * * *.

Tenth. Violations; prosecution and penalties.

The wilful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof * * *.

Eleventh. Union security agreements; check-off.

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition

of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

* * * * *

45 U.S.C. 155. Functions of Mediation Board.

First. Disputes within jurisdiction of Mediation Board.

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * * * *

45 U.S.C. 156. Procedure in changing rates of pay, rules, and working conditions.

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

45 U.S.C. 160. Emergency Board.

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the

judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 783

FLORIDA EAST COAST RAILWAY COMPANY,
a Corporation, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November 29, 1965

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

FLORIDA EAST COAST RAILWAY COMPANY,
a Corporation, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Florida East Coast Railway Company prays that in the event the United States of America petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on July 21, 1965, a writ of certiorari issue to review the questions presented and arguments advanced herein by your cross-petitioner.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals, dated July 21, 1965, is not printed herein as it is printed in an Appendix to the Petition filed herein by the United States, and at page 904 of the Record herein, and is reported at 348 F. 2d 682. The Findings of Fact and Conclusions of Law of the United States District Court for the Middle District of Florida are printed in the Joint Appendix prepared for the use of the Court below (R. 180), and are unofficially reported at 57 LRRM 2618. The preliminary injunction appealed by both petitioner and cross-petitioner to the Court of Appeals is printed in the Joint Appendix prepared for the use of the Court below (R. 189).

JURISDICTION

The judgment of the Court of Appeals entered on July 21, 1965, is not printed herein as it is printed in an Appendix to the Petition filed herein by the United States and at page 915 of the Record herein. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).[1]

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[1] Mr. Justice Black issued orders which as amended, granted all parties to this cause an extension of time to November 29, 1965, in which to file for a writ of certiorari. Mr. Justice Black's order relating to the extension of time in favor of all parties was: "Motion granted if within my power to do so." In any event this Court has jurisdiction to hear and determine the questions raised by cross-petitioner herein: *Zimmern* v. *United States*, 298 U.S. 167, 169-70 (1936); *American Trucking Ass'n* v. *Frisco Transportation Co.*, 358 U.S. 133, 145 (1958); *Walling* v. *General Industries Co.*, 330 U.S. 545, 547 (1947); *Langnes* v. *Green*, 282 U.S. 531, 538 (1938); *Public Service Commission* v. *Havemeyer*, 296 U.S. 506, 509 (1936). Cf. *Cresswell* ex rel. *Di Pierro* v. *Tillinghast*, 286 U.S. 560 (1932).

QUESTIONS PRESENTED[2]

(1) While railroad labor organizations were engaged in a strike against a railroad after all procedures established by the Railway Labor Act had been exhausted by all parties concerned, did the Railway Labor Act compel the railroad to comply with collective bargaining agreements with the striking labor organizations in limitation of the right of the railroad to resort to self-help?

(2) Inasmuch as the National Railroad Adjustment Board was established by the Railway Labor Act as the forum for the adjudication of disputes arising out of the interpretation or application of collective bargaining agreements, did the District Court in the first instance have jurisdiction to hear and determine disputes concerning the interpretation or application of collective bargaining agreements and to require that the railroad comply with such agreements during the strike

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[2] In the event a writ of certiorari is granted, cross-petitioner reserves the right to argue as it did in the Court below (1) that while railroad labor organizations are engaged in a strike against the railroad, and by law may not be compelled to perform the collective bargaining agreements, specific performance of such agreements may not be granted against the railroad alone; (2) that the United States of America has no standing to bring a suit for injunctive relief against a railroad where it does not allege any actual interference with or obstruction to interstate commerce and where, although it alleges a threat of interference with interstate commerce said to be created by violations of the Railway Labor Act, the factual situation is that the alleged violations are intended to maintain the flow of commerce; (3) that the union shop agreements with the striking labor organizations were rendered unenforceable as to the employees working for the railroad during the period of the strike by reason of said labor organizations' failure to offer membership therein on non-discriminatory terms to the aforesaid employees. Railway Labor Act, Section 2. *Eleventh*, 45 USC § 152, Eleventh.

period except upon specific advance authorization of the District Court after a finding of reasonable necessity for temporary noncompliance therewith?

STATUTE INVOLVED

The Railway Labor Act, 45 U.S.C. §§ 151-163.

The text of the Railway Labor Act, Section 2. (1), (4), (5), *First,* and *Seventh;* Section 3. *First* (i); Section 5. *First;* and Section 6., being lengthy, is set out in the Appendix hereto.

STATEMENT OF THE CASE

On January 23, 1963, after they had rejected arbitration, eleven cooperating non-operating labor organizations representing crafts or classes of employees of the Florida East Coast Railway Company (hereafter, "FEC" or "the railroad") struck the property of FEC over a wage demand as to which the procedures of the Railway Labor Act had been exhausted (R. 239, 250). The same organizations were intervenors in the Court below. All other labor organizations representing FEC employees, including the operating organizations, respected intervenors' picket lines, and FEC was forced first to shut down operations, and then to operate the railroad with supervisory personnel in order to get back into business (R. 353, 394-96).

Because of the lack of manpower, the railroad could not, in resuming operations, comply with the agreements in effect before the strike. The strike compelled the railroad to use the manpower and skills available to it. As a result, various classes of work had to be consolidated and rates of pay differed somewhat from the rates set forth in the agreements (R. 287-88, 293, 294, 352). In general, the rates paid were not less than the rates under the agreements in effect prior to the

strike (R. 357-58). The primary difference was that, because of the shortage of manpower, employees had to be worked across craft lines and seniority districts, and supervisors had to perform some of the work which would ordinarily have been performed by one or another of the crafts (R. 328, 329, 330, 358, 359).

In spite of a vigorous hiring program, it proved difficult for the railroad to obtain trained employees due to the strike (R. 672-74, 685-87, 695-96, 702, 712-14, 723-24, 740, 778-80, 782-83, 785-87). The railroad was compelled to hire relatively unskilled personnel to do skilled jobs, which necessitated lengthy on-the-job training of said employees by supervisory personnel, use of supervisory or exempt personnel to do the necessary work in the interim, and use of employees across craft lines (R. 661-62, 666-67, 672-74, 685-86, 687, 714, 724, 744, 753, 761, 763-64, 773, 775-76, 777, 782, 783, 785, 786). This shortage of personnel has persisted up to the present time.[3]

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[3] In 1963, FEC took three actions with respect to employment conditions on the railroad:

(1) on September 1, 1963, it reduced to writing the temporary practices which had grown up under strike conditions in a document entitled "Conditions of Employment" which was distributed to all employees and which was intended to be a guide to temporary conditions prevailing during the strike period (R. 288, 289-90, 293, 294, 295, 296, 302, 1004);

(2) on July 31, 1963, it issued a Section 6 Notice to eighteen labor organizations proposing cancellation of existing union shop agreements. The labor organizations, including intervenors, refused to negotiate on August 29, 1963, and on September 9, 1963, FEC notified the organizations that it was cancelling the union shop agreements because they had refused to negotiate (R. 1310, 1312-13);

(3) on September 24, 1963, it issued a Section 6 Notice proposing adoption of a "Uniform Working Agreement" as an

On April 30, 1964, the United States of America (hereinafter "the U.S." or "the Government") filed a complaint for injunctive relief and a motion for preliminary injunction in the United States District Court for the Middle District of Florida, alleging that the railroad had by its acts and conduct violated the provisions of the Railway Labor Act (R. 2-15). The eleven striking labor organizations were permitted to intervene as parties plaintiff. In substance, the complaints of the U.S. and intervenors alleged that FEC had not operated in accordance with the various collective bargaining agreements in effect prior to the strike and that under the Railway Labor Act, no change or deviation from any agreement was permissible, notwithstanding a strike.

The preliminary injunction granted by the District Court on October 30, 1964, directed FEC, *inter alia,* to reinstate and maintain the rates of pay, rules and working conditions contained in existing collective bargaining agreements with intervenors. The affirmance by the Court of Appeals of this portion of the order is challenged hereby.

The preliminary injunction provided also that the railroad was enjoined from making any unilateral changes in employment conditions without *prior* permission of the District Court, but was authorized to make application to that Court for permission to adopt employment practices deemed necessary to enable it to operate under strike conditions: see *Florida East Coast*

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amendment to existing collective bargaining agreements (R. 965-1003). When intervenors again refused to bargain or to confer with respect to this notice because of the presence of a court reporter, FEC on October 30, 1963, attempted to put this notice into effect (R. 1371-1374). The implementation of the aforesaid three actions by the railroad, which was enjoined by the District Court, is not in issue here.

Railway Company v. *Brotherhood of Railroad Trainmen,* 336 F. 2d 172 (1964), *cert. denied,* 379 U.S. 990 (1965). In accordance with this provision, FEC applied for permission to adopt certain employment practices. This application was denied in part and granted in part by order of the District Court dated December 3, 1964.

Following timely appeal by the railroad and cross-appeal by the United States from the order entered on October 30, 1964, granting a preliminary injunction and from the order entered on December 3, 1964, granting in part and denying in part approval of employment practices, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court on both the appeal and the cross-appeal, on the authority of the Court's prior decision in *Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen, supra.*

ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT

Petitioner relies upon the following reasons why the petition for a writ of certiorari sought herein should be granted if the United States petitions for such a writ:

A. After a Strike Occurs, the Railway Labor Act Does Not Require Adherence to Collective Bargaining Agreements With Striking Unions; and the Contrary Decision of the Court Below Conflicts With Applicable Decisions of This Court

Eleven cooperating non-operating unions, following their rejection of arbitration, struck the railroad on January 23, 1963, over a dispute as to which all Railway Labor Act procedures had been exhausted. The railroad was forced first to cease operations and then to resume operations with supervisory personnel.

The employees' resort to self-help empowered the railroad to resort to self-help in its turn, and to attempt to maintain its operations in any peaceable way it saw fit, *Brotherhood of Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963). No legislative or judicial policy to the contrary exists, nor is there statutory basis for holding that the railroad was legally required to comply with collective bargaining agreements with the striking labor organizations during the period of the strike, or that the railroad's right to self-help could be limited by a District Court sitting to determine which of its proposed *modi operandi* during the strike were "reasonably necessary to enable it to effectuate its right to operate . . .".[4] No such limitations or restrictions on the striking labor organizations existed or have been found to exist here; once the Railway Labor Act's procedures were exhausted as to the dispute which gave rise to the strike, the Act did not apply in any way to limit the unions' conduct of the strike, or their control over its duration. The idea that a struck carrier does not possess the same freedom to conduct its own operations once the Act's procedures have been exhausted as to the dispute which gave rise to the strike, besides being obnoxious to elementary fairness, is in direct conflict with the decisions of this Court defining and explaining national labor policy in respect to employer self-help during the period of a strike.

Clearly, the FEC's right to resort to self-help could have been terminated at any time by the unions. Calling off the strike would have reinstated fully the effectiveness of the agreements and compelled FEC to adhere strictly to them. This unquestioned right is a

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[4] *Florida East Coast Ry. Co.* v. *Brotherhood of Railroad Trainmen*, 336 F. 2d 172 at p. 182 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965).

sufficient protection to the labor organizations involved against the railroad's seeking to prolong a strike for the advantage it might gain thereby. Conversely, the railroad's use of self-help while the strike continues accomplishes a basic objective of the Railway Labor Act, *viz.* the continuance of the flow of commerce (Railway Labor Act § 2. (1)).

Basic national labor policy entitles an employer faced by a strike to dispense with complying with collective bargaining agreements with the striking unions. No one would suggest that an employer subject to the National Labor Relations Act (NLRA), in order to implement the right of self-help, would be required to have an *a priori* determination of a District Court to justify its temporary "deviations" from said agreements or that it could be compelled to show that such deviations were necessary to enable it to remain in operation during the strike. Such a doctrine robs the employer of the use of economic weapons in defense against a strike and can not be supported in view of this Court's decisions in *N.L.R.B.* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333 (1938); *N.L.R.B.* v. *Erie Resistor Corp.,* 373 U.S. 221 (1963); and *N.L.R.B.* v. *Insurance Agents International Union,* 361 U.S. 477 (1960), holding (in the words of Mr. Justice Brennan):

> "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized . . . ."[5]
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> * * *
>
> ". . . There is little logic in assuming that because Congress was willing to allow employers to use self-help against union tactics, if they were willing to face the economic consequences of its use, it also

[5] 361 U.S. 477 at p. 489.

impliedly declared these tactics unlawful as a matter of federal law.'"[6]

Yet, the Court of Appeals held that limitations upon employer self-help must be presumed to exist under the Railway Labor Act. In so holding, it not only ignored the legislative history of the Act, but put itself into direct conflict with this Court's decision in *Brotherhood of Locomotive Engineers* v. *B. & O. R. Co.*, *supra*, which held that exhaustion of the Act's provisions permits railroad carriers to resort to self-help just as it permits railway labor organizations to strike.

The doctrine that a strike or other legal impasse in labor relations permits "the legitimate use of any economic weapon by an employer" has been upheld by this Court as recently as last term in *N.L.R.B.* v. *Brown*, 380 U.S. 278, 286 (1965); *American Shipbuilding Co.* v. *N.L.R.B.*, 380 U.S. 300 (1965) and *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965), and is entirely consistent with the Railway Labor Act as interpreted by the Court in the *B. & O. R. Co.* case, *supra*, and as interpreted by the National Railroad Adjustment Board in a series of decisions.[7] The mis-

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[6] *Ibid.*, at p. 495.

[7] *Brotherhood of Railway Trainmen and Kentucky and Indiana Terminal Railway Company*, National Railroad Adjustment Board, First Division, Award No. 17,055 (1955); *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and Macon, Dublin & Savannah Railroad Company*, National Railroad Adjustment Board, Third Division, Award No. 10,197 (1961); *Brotherhood of Maintenance of Way Employees and St. Louis Southwestern Railway Company*, National Railroad Adjustment Board, Third Division, Award No. 5042 (1950); *Brotherhood of Maintenance of Way Employees and Missouri Pacific Railroad Company*, National Railroad Adjustment Board, Third Division, Award No. 5074 (1950); *Order of Railway Conductors and Boston and Maine Railroad*, National Railroad Adjustment Board, First Division, Award No. 13,341 (1950).

reading of the Railway Labor Act by the Court of Appeals below which equates the *permanent* "changes" in collective bargaining agreements forbidden by Section 2. *Seventh* of the Act with *temporary,* strike-induced changes in operating practices (which have no effect at all on the agreements as applicable upon termination of the strike) represents a frontal attack on this basic national policy and on the doctrine of the *B. & O. R. Co.,* case, *supra.* It is respectfully submitted that this attack should be rejected, and that the right of a railroad employer to combat a strike with the economic weapons at its disposal should be confirmed by this Court.

B. Whether or Not the Court Below Was Correct in Its Holding That a Struck Railroad Is Required by the Railway Labor Act To Comply With Collective Bargaining Agreements With the Striking Unions Unless Non-Compliance Is Reasonably Necessary to Maintenance of Operations. Primary Jurisdiction Over the Subject Matter Is in the National Railroad Adjustment Board

Under the Railway Labor Act, disputes "concernings changes in rates of pay, rules, or working conditions not adjusted by the parties in conference"[8] are referable to the National Mediation Board and processed through the procedures of Section 6 of the Act (and, if necessary, Section 10 as well). Disputes "arising out of grievances *or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions*"[9] are referable to the National Railroad Adjustment Board under Section 3. of the Act, and in effect, are subject to compulsory arbitra-

[8] Railway Labor Act, Section 5. *First* (a).

[9] *Ibid.*, Section 2. *Sixth.* (Emphasis supplied)

tion: *Virginia R. Co.* v. *System Federation,* 300 U.S. 515 (1937); *Elgin, J. & E. Ry. Co.* v. *Burley,* 325 U.S. 711 (1945). It would seem obvious that *if* a carrier must comply with agreements during a strike by the union parties thereto, and that *if* a dispute arises as to whether the carrier is correctly applying the agreements during the period of the strike, exclusive, primary jurisdiction as to such a dispute should lie in the Adjustment Board. Changes in operating practices introduced by a railroad to meet strike conditions may or may not be in compliance with existing agreements; they are not intended to *change* agreements, and hence cannot be subject to the provisions of Section 6.[10]

Whence, then, does the District Court derive authority to adjudicate in advance the propriety of temporary non-compliance with agreements? The answer is hard to determine, since neither the Court below nor the Court which decided the *Trainmen* case, *supra,* explained the basis of the District Court's authority to supervise the operations of a strike-bound railroad carrier. The Court below apparently felt that the District Court had general jurisdiction in equity to exercise such a supervisory power. A District Court cannot in the exercise of its general jurisdiction in equity require specific performance by one party to a collective bargaining agreement (the railroad) while the other party to the agreement (the union) is not performing and may not by law be compelled to perform while engaging in a lawful strike. Moreover, as pointed out in Argument A., *supra,* the Court lacked such power because the railroad was free

[10] The two instances in which FEC *did* attempt to change existing agreements, the railroad's Section 6 notices of July 31, 1963 and September 24, 1963, are not before the Court.

to resort to self-help and the provisions of the Railway Labor Act did not require compliance with the agreements under strike conditions. *But, even if the Act be applicable, the remedy at law of any employees injured by the railroad's non-compliance with existing agreements is complete and adequate—it is an action before the Adjustment Board.*

Cross-petitioner therefore submits that the District Court had no jurisdiction to hear and determine charges of non-compliance with the agreements. Rather, such jurisdiction belonged to the Adjustment Board under the Railway Labor Act. This Court should exercise its supervisory power over the Federal Courts to correct this unwarranted grant of power to the District Court.

C. If the Petition for a Writ of Certiorari of the United States Is Granted This Court Should Consider and Decide the Questions Presented by This Cross-Petition

On appeal below, the Government argued that the District Court (and, hence, the Court of Appeals in the *Trainmen* case) had erred in prospectively permitting the railroad to make application for approval of "reasonably necessary" employment practices, since in the Government's view the language of Section 2. *Seventh* of the Railway Labor Act is absolute, and requires a carrier to comply unconditionally with all collective bargaining agreements, even during a strike called by the labor organization parties thereto. The railroad, on the other hand, contended that the legislative history of the Railway Labor Act, this Court's holding in the *B. & O. R. Co.* case, *supra,* and common sense demonstrate that the Act was not intended to compel employers to comply with collective bargaining agreements with striking labor organizations any more

than it was intended to prohibit labor organizations from striking; and, that to require compliance with collective bargaining agreements during the temporary period of a strike nullifies the employer's right to resort to self-help as confirmed and defined by this Court. *Brotherhood of Locomotive Engineers* v. *B. & O. R. Co., supra; N.L.R.B.* v. *Mackay Radio & Telegraph Co., supra; N.L.R.B.* v. *Erie Resistor Corp., supra; N.L.R.B.* v. *Brown, supra; American Shipbuilding Co.* v. *N.L.R.B., supra;* and *Textile Workers* v. *Darlington Mfg. Co., supra.*[11]

In fairness to the integrity of its own reasoning processes, this Court should not grant the Government's petition for certiorari without also determining to consider the questions presented herein. The Government believes that the decision of the Court below writes an unwarranted "exception" into the Act; the railroad believes that the Act was not intended to require even conditional compliance with agreements with striking labor organizations, and in any event that the proper forum for adjudication of charges of non-compliance is the National Railroad Adjustment Board rather than the District Court.

If the question of the applicability of Section 2. *Seventh* and Section 6. of the Act to a railroad carrier's

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[11] It is uncontroverted that after the strike began, the railroad did not have enough manpower to comply with the agreements, and physically could not have complied with the agreements. Even the labor organizations conceded this point in *Florida East Coast Ry. Co.* v. *Brotherhood of Railroad Trainmen, supra,* 336 F. 2d 172, 181 and in oral argument below. The position of the United States is that if a railroad cannot obtain enough personnel to comply with the written agreements, it must go out of business or knuckle under to the union demands. Even the labor organizations involved have shied away from making such an extreme contention.

operations during a strike is to be examined by the Court, the Court should consider the entire issue, and decide whether the Act applies in such circumstances unconditionally (as the Government maintains), conditionally (as the Court of Appeals held) or not at all (as the railroad believes).

CONCLUSION

Cross-petitioner prays, for the foregoing reasons, that the Court should review the questions presented herein.

Respectfully submitted,

WILLIAM B. DEVANEY
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Of Counsel:

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November 29, 1965

APPENDIX

APPENDIX

APPENDIX

Railway Labor Act, 45 U.S.C. §§ 151-163

Sec. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. (45 U.S.C. § 152 (1), (4), (5))

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof. (45 U.S.C. § 152, First)

. . .

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act. (45 U.S.C. § 152, Seventh)

Sec. 3. *First.* There is hereby established, a Board, to be known as the "National Railroad Adjustment Board," the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

. . .

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements

concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes. (45 U.S.C. § 153, First (i))

Sec. 5. *First.* The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this Section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed

and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose. (45 U.S.C. § 155, First)

Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipts of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board (45 U.S.C. § 156)

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The cross-petition for a writ of certiorari raises issues closely connected with the question presented in the petition for certiorari filed by the United States in this case on November 29, 1965 (No. 782, October Term, 1965).[1] Accordingly, the United States acqui-

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[1] A petition for a writ of certiorari was also filed by the intervening unions on November 18, 1965, *Brotherhood of Ry. and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO, et al.* v. *Florida East Coast Ry. Co.*, No. 750, October Term, 1965.

esces in the granting of the cross-petition if the Court grants the petition in No. 782 and if the Court concludes that the cross-petition was timely. [2]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

DECEMBER 1965

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[2] The cross-petition was filed on November 29, 1965, more than 90 days after the entry of the judgment of the court of appeals. However, on October 15, 1965 (the 86th day), Mr. Justice Black extended the time within which the United States might petition for certiorari to and including November 18, 1965. Subsequently, after the expiration of the original 90-day period and upon the application of cross-petitioner, Mr. Justice Black amended this extension order to apply to all parties "if within my power to do so." On November 18, 1965, Mr. Justice Black further extended the time within which the United States and cross-petitioner might petition for certiorari to and including November 29, 1965.

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JOHN F. DAV

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 750

BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, AFL-CIO, ET AL.

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 782

UNITED STATES OF AMERICA

v.

FLORIDA EAST COAST RAILWAY COMPANY, ET AL.

No. 783

FLORIDA EAST COAST RAILWAY COMPANY

v.

UNITED STATES OF AMERICA

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

CONSOLIDATED BRIEF OF THE RAILWAY LABOR EXECUTIVES' ASSOCIATION, AMICUS CURIAE

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PRELIMINARY STATEMENT

The Railway Labor Executives' Association (hereafter called "Association"), on whose behalf this brief as *amicus curiae* is presented, is a voluntary unincorporated Association with which are affiliated,

through their chief executives, twenty-two national and international railway labor organizations that are the duly authorized representatives under the Railway Labor Act of the vast majority of the Nation's railroad employees. The names of these individual organizations, some of which are petitioners in Case No. 750, as follows:

American Railway Supervisors' Association
American Train Dispatchers' Association
Brotherhood of Locomotive Firemen and Enginemen
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railroad Trainmen
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Brotherhood Railway Carmen of America
Brotherhood of Sleeping Car Porters
Hotel and Restaurant Employees and Bartenders International Union
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen and Oilers
International Organization Masters, Mates and Pilots of America
National Marine Engineers' Beneficial Association
Order of Railway Conductors and Brakemen
Railroad Yardmasters of America
Railway Employes' Department, AFL-CIO
Seafarers' International Union of North America
Sheet Metal Workers' International Association
Switchmen's Union of North America
Transportation-Communication Employees Union

This Court has heretofore recognized the Association as a proper party to appear before it in litigation involving the interests of these affiliated organizations. *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U.S. 373 (1942); *Railway Labor Executives' Association* v. *U. S.*, 339 U.S. 142 (1950); *American Trucking Association, Inc.* v. *United States*, 355 U.S. 141 (1957).

In accordance with the Rules of this Court, the consent of all parties to the cases under review has been obtained for the filing of this brief by the Association as *amicus curiae* and such consents have been filed with the Clerk of the Court. Three questions of vital importance to the Association concerning the interpretation and application of the Railway Labor Act are presented by these cases for decision. In our judgment, these questions are:

1. Whether a lawful strike by employees under the Railway Labor Act temporarily suspends for the period of such strike the obligations of the carrier involved under the Railway Labor Act and its collective bargaining agreements?

2. Whether, while a lawful strike against a railroad carrier is in progress, a Federal District Court may relieve such carrier from the obligations of the Railway Labor Act and collective bargaining agreements on the ground that such relief is necessary to enable the carrier to effectuate a right of self-help during the strike?

3. Whether a carrier subject to the Railway Labor Act, which has refused to arbitrate its dispute with its employees which is the subject matter of a legal strike against the carrier and which the employees have agreed to arbitrate, may invoke the equitable

processes of a Federal Court and be granted equitable relief relieving it of contractual and statutory obligations on the ground of necessity to effectuate the carrier's right of self-help during the strike?[1]

ARGUMENT

I

The Obligations of a Railroad Carrier Under the Railway Labor Act and Its Agreements Are Not Suspended During the Period of a Lawful Strike

The Florida East Coast Railway has contended that its obligation under its collective bargaining agreements and under the Railway Labor Act are suspended during the period of a lawful strike and are revived when the strike ends (R. 103).

The Court of Appeals considered this contention and rejected it as without merit. *Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen,*

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[1] The Florida East Coast Railway Company, cross-petitioner in Case No. 783, has also raised the contention that the Federal district court had no jurisdiction to entertain the complaints of the United States and of the railway labor organizations representing its employees to require the carrier's compliance with its obligations under the Railway Labor Act because the dispute between the parties was a dispute concerning the interpretation and application of collective bargaining agreements over which the National Railroad Adjustment Board has exclusive jurisdiction pursuant to the provisions of Section 3 of the Railway Labor Act (45 U.S.C.A., Section 153). The Court of Appeals rejected this contention in its earlier decision in *Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen*, 336 F.2d 172, *cert. den.* 379 U.S. 990, which opinion was followed in the present case. The Court found (page 179) that the present situation is one in which the carrier has unilaterally instituted wholesale changes in the terms and conditions of its collective bargaining agreements without recourse to the procedures of the Railway Labor Act and does not involve any controversy over the interpretation and application of the agreements. This holding clearly conforms to the facts

336 F.2d 172, 180 (1964), *cert. den.* 379 U.S. 990, followed in the present case. The Court's findings on this read as follows:

> "Opposed both by the BRT and the United States, FEC urges that the collective bargaining agreement is wholly suspended during the strike and that any other holding will make it impossible to avail itself of its right to continue its business during the strike. It is clear that the suspension argument has no merit. The BRT is still the bargaining representative of all the employees in the crafts of trainmen and yardmen whether union members or not. Steele v. L.&N.R.R., 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173. The employees of FEC are entitled to the benefit of the terms of the agreement, and the FEC may not supersede the agreement by individual contracts, whether consented to by the employees or not. Order of Railroad Telegraphers v. Ry. Express Agencies, 1944, 321 U.S. 342, 346, 64 S.Ct. 582, 88 L.Ed. 788."

It is submitted that this holding of the Court of Appeals is clearly correct. The argument of the Florida East Coast Railway Company is to the effect that the Railway Labor Act itself is suspended with respect to a carrier's obligations during the period of a lawful strike. This is made clear by the statement of the carrier in its cross-petition in a writ of certiorari in Case No. 783 in which it states (p. 15) that "The Court should consider the entire issue, and decide whether the Act applies in such circumstances unconditionally (as the Government maintains), conditionally as the Court of Appeals held, or not at all, as the railroad believes." Thus, the carrier contends that it has no obligations of any kind under the Railway Labor Act once a lawful strike begins.

This would mean the suspension during the period of a lawful strike of the obligations of the carrier, among others, "to make and maintain agreements" (Section 2, First); the suspension of its duties and obligations to consider all disputes with its employees in conferences with representatives of the employees (Section 2, Second); the suspension of its obligation to refrain from interference, influence, or coercion over the choice of employees' representatives to confer and deal with the carrier (Section 2, Third); the suspension of its obligation to not interfere with the right of its employees to join any national organization, and the carrier's further obligation not to interfere in any way with the organization of its employees (Section 2, Fourth); the suspension of its obligation to refrain from requiring any person seeking employment to sign a contract or agreement promising to join or not to join a labor organization (Section 2, Fifth); the suspension of its obligation to submit disputes concerning the interpretation and application of collective bargaining agreements to the National Railroad Adjustment Board for final and binding determination (Section 2, Sixth); the suspension of its obligation not to change the rules or working conditions of its employees embodied in its agreements except in the manner prescribed therein or in Section 6 of the statute (Section 2, Seventh); and the suspension of its obligation to follow the procedures of Sections 5 and 6 of the statute.

Finally, the carrier's argument, if accepted, would mean that once a strike had begun it would not be possible for the President of the United States to appoint a Presidential Emergency Board under Section 10 of the statute to engage in fact-finding and suggest or recommend a basis for settlement of the

dispute, and to restore normal labor relations pending the Board's report and for 30 days thereafter, even though the President had found that it threatened substantially to interrupt interstate commerce to such a degree as to deprive a section of the country of essential transportation services. The carrier's argument, if valid, would also of necessity relieve the employees and their representatives of all obligations under the statute.

In short, the carrier's argument is to the effect that Congress intended to remove, once a lawful strike has begun, all statutory requirements on the parties with respect to continuing efforts to restore normal relations in the interest of interstate commerce, all statutory procedures which would assist the parties in settling their disputes, all protection for employees, including the statutory prohibition against forcing them into signing "yellow-dog" contracts, and to leave the whole matter to a species of jungle warfare limited only by the criminal statutes.[2]

The Florida East Coast Railway primarily relies upon the decision of this Court in *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio Railroad Company, et al.*, 372 U.S. 284 (1963), to support this sweeping proposition. However, it is submitted that this decision does not provide the basis for any such drastic conclusions. All that this case did was to clarify that once employees have exhausted all of the procedures of the Railway Labor Act in major con-

[2] The carrier's argument would necessarily include the suspension of even the criminal requirements of Section 2, Tenth, of the Railway Labor Act or of any other statute, the application of which related to obligations and duties under the Railway Labor Act.

tract disputes, they are then legally free to pursue their demands by means of a strike and that once a carrier subject to that statute has exhausted all of the statutory procedures with respect to its contract proposal, a carrier is legally free to put the proposals into effect. The decision does not, as the Florida East Coast Railway suggests, hold that the requirements of the Railway Labor Act are suspended once a lawful strike begins or that a carrier is free to disregard its collective bargaining agreements although the carrier may put into effect contract proposals that have been fully processed under the statute and as to which agreement has not been reached.

The Florida East Coast Railway also suggests that its position is supported by decisions of this Court under the National Labor Relations Act[3] and by determinations of the National Railroad Adjustment Board.[4]

The National Labor Relations Act decisions dealt with matters arising under specific provisions of that statute. The Railway Labor Act is a different statute with different procedures and requirements designed to govern management-labor relations in the railroad

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[3] The carrier has referred to the decisions in *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *N.L.R.B.* v. *Insurance Agents International Union*, 361 U.S. 477 (1960); *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963); *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965); *N.L.R.B.* v. *Brown*, 380 U.S. 278, 286 (1965); and *American Shipbuilding Co.* v. *N.L.R.B.*, 380 U.S. 300 (1965).

[4] The carrier has referred to First Division Awards No. 13,341 (Vol. 89 of First Division Awards, page 821); No. 17,055 (Vol. 122, First Division Awards, page 38); and Third Division Awards No. 5042 (Vol. 48, Third Division Awards, page 291); No. 5074 (Vol. 48, Third Division Awards, page 583); No. 10,197 (Vol. 98, Third Division Awards, page 73).

and air transport industries in which there is a particular public interest to achieve stability. See: *Local Union No. 25 of International Brotherhood of Teamsters* v. *New York, New Haven & Hartford Railroad Company,* 350 U.S. 155, reh. den. 350 U.S. 977 (1956). Moreover, none of the cases cited by the Florida East Coast Railway Company under the National Labor Relations Act holds that a lawful strike suspends the requirements of that statute.

In addition, cases under the National Labor Relations Act have held that a strike does not terminate a collective bargaining agreement (*International Union of Operating Engineers* v. *Dahlem Construction Co.,* 193 F. 2d 470, at page 475 (6th Cir., 1951); *Boeing Airplane Co.* v. *Aeronautical Industrial District Lodge No. 751,* 91 F. Supp. 596 (D.C. D.C., 1950), aff'd *Boeing Airplane Co.* v. *National Labor Relations Board,* 174 F. 2d 988 (D.C. Cir., 1949)), and that statutory requirements with respect to negotiations are not suspended by a strike. *National Labor Relations Board* v. *Small Tube Products, Inc.,* 319 F. 2d 561 (3rd Cir., 1963); *National Labor Relations Board* v. *Pecheur Lozenge Co.,* 209 F. 2d 393, 403 (2nd Cir., 1953); *National Labor Relations Board* v. *Remington Rand, Inc.,* 130 F. 2d 919, 927 (2nd Cir., 1942).

Similarly, the Adjustment Board decisions to which the carrier has referred do not hold that a lawful strike suspends statutory requirements. In each case, the Board interpreted the particular agreement before it and held that the employee claim was not supported by any provision thereof.

The Florida East Coast Railway contends that the suspension of the obligations of the Railway Labor

Act during a strike is necessary to make effective the carrier's right of self-help. The carrier suggests that once the strike begins, there are no limitations to restrict the union's conduct of the strike or control over its duration. This argument ignores the fact that all of the statutory requirements enumerated above with some exceptions are also limitations upon the unions even though a strike is in progress. Thus, the unions are under a continuing obligation to meet the statutory requirements with respect to the settlement of all their disputes, whether they arise out of the making of contracts or otherwise, and to use the procedures of the statutes to amend agreements.

Furthermore, the control of the duration of the strike is as much in the hands of the carrier as those of the union.

The carrier's argument is really one to the effect that its compliance with statutory obligations during a lawful strike, including observance of the terms of collective bargaining agreements, will be economically burdensome and will impede its ability to fight the strike. Thus, its argument is that it should be relieved from all its statutory and contractual obligations in order to be assisted in defeating the strike. It is submitted that this contention has no merit in terms of the statute or of the public interest involved. The public interest is that the strike should end as quickly as possible through negotiation pursuant to the statutory procedures. All of the provisions of the Railway Labor Act, as well as its legislative history, bespeak the fact that its purposes are to provide a framework to assist in the settlement of all disputes between

employees and carriers subject to the statute.[5] There is not the slightest indication in either the statutory language or the legislative history that Congress intended that once a lawful strike began, the statutory requirements should be abandoned. The acceptance of the carrier's proposition would increase the likelihood of strikes contrary to statutory purposes by reducing carrier risks and increasing incentives not to settle by negotiation, mediation, or arbitration. Such acceptance would, at the same time, decrease the likelihood of prompt settlement of strikes by widening the area of the dispute and by eliminating the statutory requirements with respect to negotiation and mediation which Congress has found most useful through some 40 years' experience under the Railway Labor Act. The progress and continuation of the present dispute, bolstered by the position the carrier is taking in this litigation, is ample evidence of the correctness of these conclusions.

II

The District Court Did Not Have Authority Under the Railway Labor Act to Relieve the Florida East Coast Railway of Some of Its Obligations Under the Railway Labor Act and the Carrier's Agreements

While the Court of Appeals rejected the contention of the Florida East Coast Railway that the requirements of the Railway Labor Act and the obligations of its collective bargaining agreements were suspended during a lawful strike, that Court created an entirely new concept that the Federal Courts have authority to

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[5] Particularly see Senate Report No. 905, 74th Congress, 1st Sess., pages 1-3 (1935); H. R. Rept. No. 2243, 74th Cong., 2nd Sess., pages 3-4 (1936).

relieve a carrier from such of its statutory and contractual obligations as are deemed necessary to enable the carrier to effectuate its right of self-help. Pursuant to this holding, the District Court has relieved the carrier of a statutory obligation to exhaust the procedures of the statute for the negotiation of practices previously unilaterally imposed in violation of the statute and of its agreements (R. 223). It is respectfully submitted that there is no basis in the statute or the legislative history thereof to support this conclusion.

The decision of the Court of Appeals is predicated upon the proposition that since the carrier has a legal right to operate during the period of a strike, the courts are required to fashion a rule of law which will enable the carrier to effectively exercise such right. Otherwise, the Court says the weight of the law will be on the side of the employees. The view of the Court of Appeals is summarized in the following finding: (*Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen*, 336 F. 2d 172 at page 181)

> "Since the right surely exists, the law must accommodate itself to the exercise of this power in a way that will make it effectual. Brotherhood of Railroad Trainmen v. Chicago R. & I. R.R., 1957, 353 U.S. 30, 40, 77 S.Ct. 635, 1 L.Ed.2d 622. Anything less either temporizes with the so-far-determined policy against compulsory arbitration, or puts the full weight of law on the side of the employees by making it impossible for the Railroad to carry on save on the terms and conditions imposed by the organized employees who now refuse to perform as agreed."

There is no basis whatsoever in the statutory language for this proposition. The language of the statute

is mandatory in placing obligations upon employees and carriers alike without qualification based on the existence or non-existence of a strike. Thus, Section 2, First, provides that it shall "be the duty of all carriers * * * and employees to exert every reasonable effort to make and maintain agreements". Section 2, Second, provides that all disputes "shall be considered in conference between representatives". Section 2, Third, provides that "representatives shall be designated by the respective parties without interference, influence, or coercion" and that "neither party shall in any way interfere". Section 2, Fourth, provides that "Employees shall have the right to organize and bargain collectively" and that "no carrier * * * shall deny or in any way question such right of its employees". Likewise, Section 2, Fifth and Sixth, provide mandatory requirements and Section 2, Seventh, contains an unqualified prohibition against a carrier changing rates of pay, rules, or working conditions of its employees in agreements except in the manner prescribed in such agreements or in Section 6 of the statute. Neither the Court of Appeals nor the Florida East Coast Railway can cite any legislative history which would in any way qualify or modify the mandatory obligations of the statute so as to provide a basis for a court to relieve a carrier of obligations thereunder.

The decision of the Court of Appeals also assumes that the right of a carrier to operate during the period of a strike is an absolute right. The rationale of its decision is such that the carrier would have to be relieved of any statutory obligation of any kind, shape, or description which impeded in any way its ability to carry on an operation as an effective weapon. Thus, as a matter of legal concept, the only restriction on the authority of the District Court to relieve the car-

rier of any contractual or statutory obligations under either the Railway Labor Act or under any other statute would be the necessity for such relief to effectuate the carrier's right to operate. The same logic would require that unions similarly be relieved of all statutory obligations deemed necessary for them to effectuate their legal right to strike.

No detailed argument is necessary to make clear that this acceptance of this proposition starts the Federal Courts down a long road in which they become the sole arbiters in labor disputes, not of what is the law, but of what is needed by a carrier to operate during a strike and by unions to carry on strikes. The decision substitutes the courts for Congress in determining the applicability of statutory requirements during a lawful strike. If the application of the statutory requirements to a carrier during the period of a lawful strike does in fact impose any undue burden upon it and unduly interferes with its operating as a strike weapon, then the solution for this problem clearly lies with the Congress and not with efforts by the courts to redress a claimed imbalance by writing the statute out of existence.

This Court has recently considered the "necessity" argument as advanced by a labor organization in support of a particular interpretation of a Federal statute, in that case Title 28 of the Judicial Code, Section 1332, and held that the union's arguments, however appealing, were addressed to an inappropriate forum and "ought to be made to the Congress and not to the courts". *United Steelworkers* v. *Bouligny*, ... U.S. ..., 15 L. Ed. 2d 217 (decided November 22, 1965). The Association does not concede that there is in fact

any need for the Florida East Coast Railway to be relieved of any obligations under the Railway Labor Act. However, this is not a proper matter for the courts. The division of authority in our government requires that any contentions of the carriers in that regard be addressed to the Congress and not to the courts.

Finally, it should be observed that the decision of the Court of Appeals disregards the provisions of the collective bargaining agreements here involved. Those agreements, like agreements generally throughout the railroad industry, and unlike agreements under the National Labor Relations Act, do not contain a specific termination date but provide that they are to continue in effect until revised in accordance with the statute.[6] Such provisions do not contain any clauses relieving the carrier from its contractual responsibility to carry out the statutory procedures with respect to the revision of the agreements in cases where a lawful strike is conducted against a carrier. Thus, as a matter of simple contract law the carrier has contracted and agreed to abide by the statutory procedures. See: *International Union of Operating Engineers* v. *Dahlem Construction Co.*, 193 F. 2d 470, at page 475 (6th Cir., 1951); *Boeing Airplane Co.* v. *Aeronautical Industrial District Lodge No. 751*, 91 F. Supp. 596 (D.C. D.C., 1950), aff'd *Boeing Airplane Co.* v. *National Labor Relations Board*, 174 F. 2d 988 (D.C. Cir., 1949); *International Association of Machinists* v. *Northwest Airlines*, 304 F. 2d 206 (8th Cir., 1962).

[6] It is the understanding of the Association that these agreements have not been printed in the record before the Court because they are bulky and already in printed form, but that instead representative agreements have been supplied to the Court.

III

The Florida East Coast Railway Was Barred from the Relief Granted by Its Failure to Make Every Reasonable Effort to Settle the Underlying Labor Dispute

Assuming *arguendo* that the District Court had authority to grant relief of the type here involved to a carrier in an appropriate situation, it is submitted that the Florida East Coast Railway was barred from such relief by its failure to make every reasonable effort to settle the underlying labor dispute which it claims necessitated such relief. In *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & Western Railroad*, 321 U.S. 50 (1954), this Court held that a carrier which had refused to arbitrate a labor dispute, which the labor organization involved had agreed to arbitrate, could not invoke the equitable processes of a Federal court for injunctive relief to prevent alleged illegal actions, i.e. violence, during the course of a railroad strike. The decision was based upon the provisions of Section 8 of the Norris-LaGuardia Act.[7]

In *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers*, 307 F. 2d 21 (1962), the United States Court of Appeals for the Second Circuit invoked the same principle to bar injunctive relief against a strike to a railroad which had unilaterally made changes in its operations in violation of existing collective bargaining agreements without negotiations with the labor organizations involved. The decision

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[7] Section 8 of the Norris-LaGuardia Act (29 U.S.C.A., Section 108) reads as follows: "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

of the Second Circuit equated the requirements of Section 8 of the Norris-LaGuardia Act with the nonstatutory duty of "clean hands" imposed on all who seek jurisdiction in a court of equity.[8]

In the present case, the Florida East Coast Railway applied to the District Court for relief in the form of approval of certain practices which were in violation of its collective bargaining agreement (R. 189, 216). The District Court granted the application with respect to certain of these practices (R. 223-225). At the time this application was made, the Florida East Coast Railway was in violation of the Railway Labor Act in having unilaterally instituted these practices without utilizing the procedures of the statute to obtain agreement thereto. (R. 180-191.) Thus, the carrier was in the same position as was the railroad seeking injunctive relief in the *Rutland* case.

Moreover, the Florida East Coast Railway was continuing to refuse to arbitrate the underlying labor dispute which its application asserted gave rise to a need for the requested relief, although the labor organizations involved had agreed to such arbitration (Exhibit Vol. 1, pp. 459, 461).[9] Thus, the Florida East Coast Railway at the time it requested and was granted relief from the requirements of the Railway Labor Act with respect to the need for negotiating the certain changes in working conditions embodied in its collective bargaining agreements was in the same position as was the railroad in the *Toledo, Peoria & Western* case in that it had not exhausted every reasonable

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[8] Footnote 13, page 42.

[9] Originally, both the labor organizations and the railroad had refused the proffer of arbitration by the National Mediation Board. Subsequently, the unions agreed to such arbitration while the carrier refused. This was the same situation which prevailed in the *Toledo, Peoria & Western* case.

effort to settle the labor dispute which gave rise to the claim for relief and thus would not qualify for such relief both under the applicable statute and under the equitable "clean hands" principle.

The Association therefore respectfully submits that even if the District Court had power to grant relief from the statutory requirements in an appropriate case, the Florida East Coast Railway was barred from obtaining such relief in this case.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals in the above-entitled cases should be reversed and the cases remanded with directions to the District Court to dismiss the application of the Florida East Coast Railway for relief from its obligations under the Railway Labor Act and its collective bargaining agreements.

Respectfully submitted,

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March, 1966

FILE COPY

IN THE

Supreme Court of the United States

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JOHN F. DAVIS, C

OCTOBER TERM, 1965

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF FLORIDA EAST COAST RAILWAY COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 750, 782, 783

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS AND STATION EMPLOYEES, et al.,
Petitioners,

No. 750 v.

FLORIDA EAST COAST RAILWAY COMPANY,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

No. 782 v.

FLORIDA EAST COAST RAILWAY COMPANY,
Respondent.

FLORIDA EAST COAST RAILWAY COMPANY,
Petitioner,

No. 783 v.

UNITED STATES OF AMERICA,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF FLORIDA EAST COAST RAILWAY COMPANY

This brief *amicus curiae* is filed by the Association of American Railroads pursuant to Rule 42 (2) of the Rules

of this Honorable Court. It is accompanied by written consent to its filing by the Solicitor General of the United States, by the Brotherhood of Railway Clerks and other labor organizations, and by Florida East Coast Railway, being all of the parties to the case.

I. INTEREST OF AMICUS CURIAE

The Association of American Railroads is a voluntary, unincorporated, nonprofit organization composed of member railroad companies operating in the United States, Canada, and Mexico. These railroad companies operate more than 95 per cent of the total railroad mileage and have approximately 98 per cent of the total operating revenues of all railroads in the United States. The activities of the Association cover a wide range, having to do with such matters as research, operations, car service, safety, public relations, accounting, statistics, law, and federal legislation and regulation, insofar as those matters require joint handling in the interest of safe, adequate and efficient railroad service to the public.

The Association is the joint representative and agent of these railroads in connection with federal legislation and legal matters of common concern to the industry as a whole. It has an interest in significant interpretations of federal legislation that will apply generally to all of its members. The issues raised in the present case relating to the proper construction of the Railway Labor Act are of vital importance to the entire railroad industry. The Court of Appeals has construed and applied the Act so as to overturn a practice followed by the railroads for generations and never questioned before.

II. STATEMENT OF THE CASE

The issue with which we are primarily concerned depends on very few bare facts—a carrier confronted with a strike by its employees has in its own defense exercised its right to resort to self-help and restored such of its operations as it could through use of supervisory and replacement employees working temporarily under rates of pay, rules and conditions different from those provided in collective bargaining agreements in force prior to the work stoppage.*

The temporary character of departures from the provisions of collective agreements is to be emphasized. We are not here contending that railroads are free under the Railway Labor Act to impose unilaterally permanent changes in working conditions to extend beyond the life of the strike without resort to the major dispute processes of the Act. In our view, any temporary conditions necessitated by a carrier's resort to self-help in defense against the self-help measures invoked by striking employees would immediately cease to be operative upon termination of the strike.

Since the opinion of the lower court here for review, *Florida East Coast Ry. Co.* v. *United States,* 348 F.2d 682 (5th Cir., 1965), does not itself enunciate in any detail the bases for its holding but relies for the law of the case on its earlier decision in *Florida East Coast Ry. Co.* v. *Brotherhood of Railroad Trainmen,* 336 F.2d 172 (5th Cir., 1964), it is necessary to turn to the latter to find the rulings of law to be reviewed by this Honorable Court.

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* To avoid tedious repetition of "rates of pay, rules and working conditions," we shall hereafter refer only to "conditions" or "working conditions," intending in each instance that this word or phrase be understood to include the entire scope of "rates of pay, rules, and working conditions."

As we read that case, the decision of the court as applied to the strike involved here can be summarized as follows:

> Florida East Coast could not lawfully institute the temporary changes in working conditions it placed in effect on February 3, 1963, when it undertook to resume operations on a limited scale in the face of the strike of non-operating unions In doing so, it violated Section 6 of the Railway Labor Act. 336 F.2d at 180. Notwithstanding the strike collective bargaining agreements between the unions and the carrier effective prior thereto continue in full force and effect during the strike except to the extent that temporary changes therein may, as hereafter stated, be permitted by a court. *Ibid.* Also notwithstanding the strike called by the non-operating unions and the refusal to work by employees represented by them at the time of the strike, those unions continue to be the bargaining representatives of employees who ignore the strike and work in the non-operating crafts or classes while the strike is in progress. *Ibid.*
>
> When faced with a strike, a carrier is free to resort to self-help—that is, to operate or attempt to operate regardless of the strike. 336 F.2d at 181. But this does not mean that otherwise applicable collective bargaining agreements can be ignored; "self-help" is "help which is reasonably needed to meet the impasse of a railroad desiring to run and unions unwilling to furnish workers." *Ibid.* A carrier confronted by a strike can depart from working conditions specified in collective agreements, but it must present such temporary changes to a federal District Judge and prove that requested changes are "reasonably necessary" to make a "meaningful reality" of its "right to continue to operate." 336 F.2d at 182.

The railroad industry represented by the Association of American Railroads agrees with Florida East Coast that the Court of Appeals erred in construing the Act to require carriers to adhere to prestrike conditions during a work stoppage.

III. QUESTION PRESENTED

A number of questions have been raised by the parties. We do not propose to deal with whether the United States has standing to maintain its suit for injunctive relief, or whether the National Railroad Adjustment Board has primary jurisdiction of the subject matter of this suit. We shall direct our attention to a single subject:

> Does the Railway Labor Act severely curtail the right of self-help which a carrier is entitled to exercise when faced with a strike by its employees by compelling it to adhere to and apply all provisions of collective bargaining agreements in force prior to the strike except to the extent that temporary relief from some of such provisions may be granted by a court on a showing by the carrier that relief therefrom is "reasonably necessary?" Or is a carrier subject to the Railway Labor Act, when faced with a strike by its employees, entitled in its exercise of its right of self-help to operate or attempt to operate as best it can for the duration of the work stoppage under such temporary working conditions as it alone deems necessary and which are not otherwise unlawful?

IV. SUMMARY OF ARGUMENT

A. Carriers subject to the Railway Labor Act are entitled to resort to self-help in defense against a strike called in connection with a major dispute in which the processes for handling such disputes prescribed by the Act have been exhausted. *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U.S. 284, 291 (1963); *Pan American World Airways* v. *Flight Engineers International Assn.*, 306 F.2d 840, 846 (2d Cir., 1962).

B. The self-help which carriers can exercise in defense against a strike must be construed in light of their common-law and statutory duty to provide transportation service. The fact that their employees refuse to perform their duties is no excuse for a failure or refusal to serve. *Illinois Central R. Co.* v. *International Ass'n of Machinists*, 190 Fed. 910 (E.D. Ill., 1911); *Stephens* v. *Ohio State Telephone Co.*, 240 Fed. 759 (D.C. Ohio, 1917); *Farmers Grain Co.* v. *Toledo, Peoria & Western R.R.*, 66 F.Supp. 845 (D.C. Ill., 1946); *Farmers Grain Co.* v. *Toledo, Peoria & Western R.R.*, 158 F.2d 109 (7th Cir., 1947).

C. It has been a matter of practice in the railroad industry for many years for carriers to operate or attempt to operate in the face of a strike as best they can under working conditions made temporarily necessary by the work stoppage, and without reference to whether such working conditions complied with the requirements of collective agreements effective prior to the strike.

D. Collective bargaining agreements are contracts. *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 334-336 (1944). When unions strike carriers with which they have collective agreements in an effort to compel acceptance of demands for changes, they are neces-

sarily repudiating those agreements. Under the common law of contracts, the agreements are thereafter unenforceable against the carriers—they are suspended for the duration of the strike. 5 WILLISTON, CONTRACTS §§ 1301, 1302 (Williston and Thompson rev. ed. 1937). The common law of contracts is applicable to labor agreements. *United Electrical Workers* v. *National Labor Relations Board*, 223 F.2d 338, 341 (D.C. Cir., 1955), cert. denied 350 U.S. 981 (1956), rehearing denied 351 U.S. 915 (1956).

E. The Railway Labor and National Labor Relations Acts are based on a common federal policy of labor relations. *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 346 (1944); *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514, 524-525 (1941). In numerous cases arising under the National Labor Relations Act, this Court and Courts of Appeals have emphasized that parties to labor disputes are not to be limited in their resort to self-help except as clearly indicated by Congress. *National Labor Relations Board* v. *Insurance Agents Union*, 361 U.S. 477 (1960); *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300 (1965); *Hawaii Meat Co.* v. *National Relations Board*, 321 F.2d 397 (9th Cir., 1963); *National Labor Relations Board* v. *Abbott Publishing Co.*, 331 F.2d 209 (7th Cir., 1964).

F. In limiting the right of carriers subject to the Railway Labor Act to operate or attempt to operate during a strike, the Court of Appeals has construed the Act contrary to its stated purpose of attempting to avoid interruptions to commerce and to operations of carriers. In allowing unions to repudiate collective agreements completely during strikes, while at the same time requiring carriers to abide by the provisions of such agreements, the Court of Appeals has failed to accord the parties the equality which it was a purpose of the Act to establish.

G. The Railway Labor Act, in its provisions involved in this case, is a criminal statute. As such it should be strictly construed and the actions of Florida East Coast complained of held not contrary to the Act unless they were plainly and unmistakably made unlawful by Congress. *United States* v. *Resnick*, 299 U.S. 207, 209-210 (1936); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952). This strict construction must be applied here even though this is a civil case because substantively the Act must mean the same whether it is sought to enforce it in a civil action or a criminal prosecution. The Act is not so clear that this Court could sustain a criminal charge against Florida East Coast, so the interpretation of the Court of Appeals must be rejected.

H. The construction of the Act by the Court of Appeals rests on one part of one section taken out of context. Considered in context with other relevant sections, the words of the Railway Labor Act tend to affirm rather than condemn the right of carriers to disregard collective agreements with striking unions.

I. Nothing in the legislative history of the Railway Labor Act affirmatively supports the construction given it by the Court of Appeals. Negatively, however, that history tends to contradict the court. There is no indication that Congress intended to overturn the practice of railroads operating or attempting to operate during strikes. Nor is there any evidence that the unions ever complained to Congress about the practice.

J. While the striking unions remain the collective bargaining representatives of the crafts or classes of employment they represented prior to the strike as long as the strike lasts or unless and until they are replaced by other

unions, they have no enforceable collective agreements during that period. They caused the suspension of those agreements by their act of striking. In the absence of enforceable collective agreements, carriers are free for the duration of the strike to establish working conditions in individual contracts with employees who work during the strike.

K. The legal consequences of the decision of the Court of Appeals are such as to indicate that that decision must be reversed.

L. The actual experience of Florida East Coast does not show that the result of the decision of the Court of Appeals is practical or reasonable. That the carrier was able to restore pre-strike working conditions after operating under different conditions for some 21 months, does not tend to prove that it could have provided the service its duty requires if it had been compelled to apply those conditions from the outset of the work stoppage. The uncontradicted record shows the contrary.

V. ARGUMENT

Does the Railway Labor Act, as the courts below have held and the government and unions here contend, forbid a carrier faced with a strike to make temporary changes for the duration of the work stoppage in working conditions contained in collective bargaining agreements with the striking unions without first exhausting the major dispute procedures prescribed by the Act? Or does the Act, as Florida East Coast and the railroad industry contend, leave a carrier faced with a strike free, without following the statutory major dispute processes, to make such temporary changes in conditions for the duration of the work stoppage as it thinks necessary to its exercise of self-help which are not otherwise unlawful? Put another way—is self-help under the Railway Labor Act really a one-way street open only to unions?

The Act was not adopted in a vacuum but against a background of many years' experience in dealing with railroad labor problems. Erdman Act of 1898, 30 Stat. 424; Newlands Act of 1913, 38 Stat. 103; Adamson Act of 1916, 39 Stat. 721; Title III of the Transportation Act of 1920, 41 Stat. 469.

The Act was superimposed on a system of collective bargaining in which the parties were free, except to the extent specifically or by necessary implication restricted, to include in collective agreements any provisions they wished. Under the Act itself, agreement is not compelled, *Virginian Railway* v. *System Federation No. 40,* 300 U.S. 515, 548 (1937), and the law, except for minimal limitations, does not concern itself with the content of collective agreements. *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen,* 318 U.S. 1, 6 (1943).

When the Railway Labor Act became law nothing restricted the right of carriers to operate during strikes under temporary conditions designed to facilitate their resort to self-help. What then was the intent of Congress in the Act? Did it mean to overturn or limit this accepted right of the carriers?

We submit that the law, common sense, and elementary concepts of equity require that this Court construe the Railway Labor Act as we herein urge. Indeed, if this construction is not adopted, we perceive serious constitutional problems under the due process clause of the Fifth Amendment to the Constitution of the United States.

A. When Confronted by Strikes, Rail Carriers Are Entitled to Resort to Self-Help; the Railway Labor Act Must be Construed to Give a Sensible Scope to the Self-Help Carriers Can Utilize

The Court of Appeals did not question that Florida East Coast was entitled to resort to some form of self-help when confronted by a strike of its non-operating employees on January 23, 1963. The dispute over which the strike was called grew out of a demand by those unions for an increase in the rates of pay provided in the collective agreements between them and the carrier. It was by definition a major dispute, *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 723 (1945), and it had been progressed through all the major dispute procedures required by the Railway Labor Act without settlement. The processes of the Act having been exhausted, the parties—including the carrier—were free, as this Court squarely ruled in *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U.S. 284, 291 (1963), to resort to self-help. The Second Circuit returned the same ruling in *Pan American World Airways* v. *Flight Engineers International Assn.*, 306 F.2d 840, 846 (2d Cir., 1962).

Knowing that a carrier can resort to self-help under strike conditions is one thing. What is meant by "self-help" in this context is something quite different. Congress did not define it for us and we are left to do the best with what we have.

In seeking to ascertain the intent of Congress, we must approach the Railway Labor Act from the basis of the well settled canon of construction which directs that acts of Congress must be construed sensibly, so as to effectuate the legislative intent and avoid absurd results. *Haggar Co.* v. *Helvering,* 308 U.S. 389, 394 (1939); *Armstrong Co.* v. *Nu-Enamel Corp.,* 305 U.S. 315, 332-333 (1938); *Alexander* v. *Cosden Co.,* 290 U.S. 484, 496 (1933); *Burnet* v. *Guggenheim,* 288 U.S. 280, 285 (1932); *Sorrells* v. *United States,* 287 U.S. 435, 446 (1932); *United States* v. *Katz,* 271 U.S. 354, 357 (1926); *Lau Ow Bew* v. *United States,* 144 U.S. 47, 59 (1892).

B. Any Concept of the Self-Help Carriers Are Entitled to Exercise Under Strike Conditions Must Take Into Account their Common-Law and Statutory Duties to Furnish Transportation Services

This case does not involve the rights of a manufacturer, a distributor, a builder, or a seller of goods. We do not mean to disparage the significance of their rights or interests, but at stake here are not only the rights and interests—but also the duties—of common carriers by rail, for they are under obligations imposed both by the common law and by Sections 1(3), 1(4), 1(11), and 8 of the Interstate Commerce Act, 49 U.S.C. §§ 1(3), 1(4), 1(11), 8, to provide shippers with transportation service on a reasonable request therefor. Consequently, in a dispute like this between railroads and unions representing their employees, "More is involved than the settlement of a

private controversy without appreciable consequences to the public." *Virginian Railway* v. *System Federation No. 40*, 300 U.S. 515, 552 (1937). The public may be abstractly concerned with preservation of an orderly scheme for settlement of railroad labor disputes, but it is directly and immediately concerned with preservation of rail service to the maximum extent reasonably possible notwithstanding a strike.

This duty to serve cannot be excised from the carriers' right to take self-help measures under strike conditions. It means to us that the matter of resort to self-help extends beyond being a "right" because it includes certain elements of duty. In other words, carriers have not only a "right" to resort to self-help under strike conditions but are required to make reasonable efforts to exercise that right.

This duty has been recognized for many years in common carrier and public utility cases. In *Illinois Central R. Co.* v. *International Ass'n of Machinists*, 190 Fed. 910 (E.D., Ill., 1911), a carrier sought and was granted injunctive relief against acts of trespass committed by its striking employees. Its common carrier obligations were an important consideration to the court which granted relief:

> ". . .[T]he railroad company . . . has certain duties to perform of a public nature, and in which all the people are interested. It is bound to carry the United States mail with safety and dispatch. It is bound to carry interstate passengers and freight in conformity to the laws of the United States. It is bound to keep its cars, engines, and safety devices in good order, in obedience to the laws of the United States. And, this being an absolute duty, nothing can be interposed as a defense for a failure in that regard, and the penalties of the law thereby be avoided." 190 Fed. at 912.

In *Stephens* v. *Ohio State Telephone Co.*, 240 Fed. 759 (D.C. Ohio, 1917), patrons of a telephone company sought injunctive relief to compel the company to provide the service required of it by the law. The company's defense was that a strike by its employees prevented it from giving service. Pertinent here was the question raised whether a federal cause of action existed under the circumstances. The court said that Congress intended in the Interstate Commerce Act to classify telephone companies with "railroads and other transportation common carriers." 240 Fed. at 767. It held that the complaint presented a controversy under the laws of the United States. *Id.*, at 769. The court also expanded on the company's duty to provide service despite a strike by its employees:

> "The Ohio State Telephone Company is a public utility. Its first duty is to serve the public. Its work meets a vital public necessity. The right of its striking employes to 'interfere by lawful means' with its business does not mean a right to cripple performance by it of its duties to the public, if it can find people willing to work for it. If labor can be had, the company must employ, and the strikers must permit it to employ and use, labor to perform its public duties, and any one willing to work for it must be allowed by everybody entire freedom to do so. The public, having a great need for services of the character offered by this public utility, has an enforceable right to demand these conditions of both the company and of those associated in controversy with it. This court is empowered to say to the company that it must meet its public obligations. Coupled with that power of the court is the power and duty of laying its prohibitive and punishing hand upon any one whose willfully unlawful conduct tends to render abortive the exercise of that power. We can no more say to the company that it must yield to the demands of its striking employes than we can

say to them that they must meet the company's exactions. The controversy must be carried on, on both sides, without substantial detriment to the company's public service." 240 Fed. at 775

The *Illinois Central* and *Stephens* cases were cited in *Farmers Grain Co.* v. *Toledo. Peoria & Western R.R.*, 66 F.Supp. 845 (D.C., Ill. 1946), which illustrates our precise point even though it was a by-product of one of the most dismal chapters in railroad labor relations history. A group of shippers filed suit against a strike-bound railroad and the striking unions, seeking an injunction to compel restoration of rail service and appointment of a receiver. Reiterating the paramount public interest in that service, the District Court ruled that the railroad was "under an absolute duty to operate," 66 F.Supp. at 861, and appointed a receiver.

The Court of Appeals, while reversing the appointment of a receiver, said that a mandatory injunction would lie to compel the carrier to operate in the face of a strike if the order protected the carrier from interference. *Farmers Grain Co.* v. *Toledo, Peoria and Western R.R.*, 158 F.2d 109, 116, 118-119 (7th Cir., 1947). This Court granted certiorari but later directed that the judgment of the Court of Appeals be vacated and the case remanded to the District Court or be dismissed as moot. *Farmers Grain Co.* v. *Brotherhood of Locomotive Firemen*, 332 U.S. 748 (1947).

A carrier's duty to serve despite labor difficulties is shown under different circumstances in *Burlington Transportation Co.* v. *Hathaway*, 12 N.W. 2d 167 (S.C. Iowa, 1943). There it was held that a common carrier by motor vehicle was entitled to an injunction to restrain striking employees of a shipper from interfering with performance by the carrier's employees of the carrier's duty to serve the shipper. The court cited a case from Washington State

in which a motor carrier's operating permits had been temporarily suspended on complaint of a patron for refusal to send trucks through a picket line at the patron's place of business because of a threat of the union that the carrier's employees would strike if that were done. *Consolidated Freight Lines* v. *Department of Public Service,* 200 Wash. 659, 94 P.2d 484 (S.C. Wash., 1939).

The leading case of recent years dealing with the common problem of service to a strike-bound shipper is *Minneapolis & St. Louis Ry. Co.* v. *Pacific Gamble Robinson Co.,* 215 F.2d 126 (8th Cir., 1954). The carrier there sought to establish the reasonableness of its failure to switch and furnish cars to a struck plant through evidence that its regular employees and its supervisors refused to serve the plant in question because the striking union had an unsavory record of violent retaliation against those who did not honor its picket line, coupled with a long memory. Emphasizing the carrier's duty to render service the Court of Appeals said:

> "While the law, of course, exacts only what is reasonable from a carrier, *Midland Valley R. Co.* v. *Barker,* 276 U.S. 482, 485 . . ., it does, in the general public interest, require of every carrier 'the utmost fairness and good faith on its part in dealing with the shipper and in the discharge of its duties to him,' *Chicago & E.I.R. Co.* v. *Collins Produce Co.,* 249 U.S. 186, 193 . . . ." 215 F.2d at 134.

The court gave a significant answer to a contention by the railroad that its employees could lawfully refuse to cross the picket line at the struck plant Even assuming that the carrier was correct in that claim, it ruled that this neither meant nor implied that "the carrier is left without any duty to make any effort whatsoever to furnish service in such a situation." 215 F.2d at 137.

To the same end, see *General Drivers* v. *American Tobacco Co.*, 264 S.W. 2d 250 (Ct. Apps., Ky., 1954), and *Merchandise Warehouse Co.* v. *A.B.C. Freight Forwarding Corp.*, 165 F.Supp. 67 (D.C. Ind., 1958).

When railroad employees refuse in such cases to perform their regular assignments and provide service to a strike-bound facility of a shipper, their action constitutes a form of work stoppage directed against the carrier itself. The result—albeit on a small scale—is directly analogous to that of full-blown strike. If a carrier is required by law to exert every reasonable effort to serve strike-bound shippers notwithstanding the failure or refusal of its regular employees to give such service, it must also be under a similar duty to give service when its regular employees, in the course of a strike of their own, refuse to serve any shippers whom they would serve but for the strike.

The case at bar provides an example of enforcement of the duty of a struck carrier to provide service notwithstanding a work stoppage. Florida East Coast resumed passenger service on August 3, 1965, at the order of the Commerce Commission of the State of Florida. To be sure, this was some months after the carrier had reinstituted pre-strike working conditions at the order of the courts below. There is no connection, however, between the working conditions being applied by the carrier and the power of the state to compel it to provide service. That power would exist—if it exists at all—no matter what working conditions were being applied by the carrier.

This common-law and statutory duty of a common carrier to make reasonable efforts to provide service whether its employees are disposed to or not stands side-by-side with the common law right of the carrier sanctioned by the

Railway Labor Act to resort to self-help in defense against strike measures taken by its employees. To the extent that a carrier's right to self-help is limited by restrictions on its efforts to operate during a strike, its duty to render service as a common carrier is impaired.

This raises the familiar problem of resolving an apparent conflict between two seemingly opposed statutory objectives. But the courts below here actually created the problem where none existed before by their interpretation of the Railway Labor Act as requiring carriers to apply provisions of pre-strike collective agreements notwithstanding the intervention of a work stoppage. The interpretation urged by Florida East Coast and the railroad industry would, on the other hand, obviate the problem. Under the settled principle of statutory construction preferring an interpretation which avoids the problem without impairing the effectiveness of either of two policies asserted to be in conflict, *Allen-Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, 806 (1945), the opinion of the Court of Appeals in the case at bar should be rejected.

The duty of common carriers to provide service is relevant not only to an appraisal of the self-help they are entitled to exercise under strike conditions but also to the extent to which employees are authorized to strike. That is, by the act of accepting positions with carriers, employees must be taken to have assumed at least some aspects of the carriers' common-law and statutory duty to provide transportation service. This does not necessarily mean that they cannot strike but it does mean that as a part of their right to strike they cannot fairly expect to be able to shut down the carriers' operations altogether and thereby deprive the public completely of essential rail transportation services it is entitled by law to receive from the

carriers. A more expansive view of the right to strike under the Railway Labor Act would be to extend an unwarranted preference to the policies of that Act at the expense of the policies of the common law and the Interstate Commerce Act.

C. The Court of Appeals has Construed the Railway Labor Act to Make Unlawful a Settled and Accepted Practice in the Railroad Industry

Without benefit of citation to source materials or the record, the government asserts flatly that, "We note, however, that FEC is the only railroad carrier to attempt to operate during a strike in the last five years." Petition for Certiorari, No. 782, 14-15.

This is not so. The fact is that in the last five years there have been a number of strikes in which railroads have attempted to operate during a strike with supervisory personnel with varying degrees of success and, in some instances, with replacement employees. As a rule, these strikes were of comparatively brief duration so that operations were effected by supervisory personnel alone because there was no time to hire replacements.

Within the past 18 months or two years, there have been several rail strikes—again, most of them short-lived—in which carriers were able to continue to provide some service with supervisory personnel. For example, Santa Fe had three strikes in the calendar year 1965 alone. In each instance, it was able to continue at least limited service through use of supervisors and some employees who chose to work rather than strike. The Birmingham-Southern had similar experience during an 11-day strike from November 11 to November 22, 1965. The Port Terminal Railroad Association of Houston, an essential switching facil-

ity, was subjected to a 47-day strike from December 16, 1964, to February 1, 1965. It was able, however, to provide needed service to shippers through use of supervisor and replacement employees.

It is a matter of common practice in the railroad industry for carriers faced with strikes to attempt to provide such service as they can through use of supervisory personnel, and, if the strike continues long enough and the prospects of settlement are dim enough, they will seek to hire replacement employees. This practice was developed in the record of the 1961 hearings before the Presidential Railroad Commission established to investigate the fireman, crew consist and work rules disputes between most of the nation's rail carriers and the unions representing operating employees. Exec. Order No. 10891, 3 C.F.R. 418 (1959-1963 Comp.). The uncontradicted testimony relating the practice appears at pages 14666-14822 of the Transcript of Proceedings of the Presidential Railroad Commission on file with the National Mediation Board. Its purpose was to establish that fireman and crew consist rules then prevailing required more employees than necessary for safe and efficient railroad operations by showing that during strikes carriers had been able to operate safely and efficiently by using supervisors not working under collective agreement conditions. To this end, the witness prefaced his testimony with this statement:

> "It has become almost invariable in this industry that where one craft of railroad employees is engaged in a work stoppage, other organized employees including the operating crafts, refuse to cross the picket lines. It is also commonplace for the operating employees to refuse to provide service to a customer whose employees are on strike. In such instances as these the railroads have, where possible, undertaken to serve the needs of their patrons by operating with

crews of supervisory personnel. These situations are so numerous that I will report to the Commission only on a few which are representative . . ." Transcript, *supra,* at 14673.

Railroad efforts to operate under strike conditions are but part of a practice accepted by and expected of employers generally. This Court has explicitly acknowledged and approved it. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 345-346 (1938); *National Labor Relations Board* v. *Columbian Co.,* 306 U.S. 292, 295 (1939). It has likewise been recognized and sanctioned by the Courts of Appeals. *Textile Workers* v. *Arista Mills Co.,* 193 F.2d 529, 534 (4th Cir., 1951); *National Labor Relations Board* v. *Bradley Washfountain Co.,* 192 F.2d 144, 153 (7th Cir., 1951); *National Labor Relations Board* v. *Jackson Press, Inc.,* 201 F.2d 541, 546 (7th Cir., 1953).

Both the government and the unions call attention to the fact that in the entire history of the Railway Labor Act no court has ever ruled that a railroad could, in the face of a strike, attempt to provide some transportation service to shippers and passengers through use of supervisory personnel and replacement employees working under other than pre-strike agreement conditions. (Petition for Certiorari, No. 750, 10; Petition for Certiorari, No. 782, 15-16).

The answer to this is easy. It turns on the accepted practice of the industry. The reason why no court has ever ruled on the question raised here is that no one ever thought to raise it before. In other words, since enactment of the Railway Labor Act the American railroads have been operating or attempting to operate during work stoppages with employees governed by other than pre-strike working conditions, yet, to our knowledge, neither

the unions nor the government have ever undertaken to attack in court the lawfulness of such action. Until now it surprised no one.

If, as it now alleges, the changes unilaterally instituted by Florida East Coast on February 3, 1963, violated the "unambiguous and unqualified language of the Railway Labor Act" (Petition for Certiorari, No. 782, 9), why did the government wait until April 30, 1964, to try to do something about it? Likewise, if as the unions now say, the carrier violated the "clear, plain, mandatory provisions of the Railway Labor Act" (Petition for Certiorari, No. 750, 10), why did they wait for 15 months to move in and attempt to protect the interests of their constituents?

D. The Court of Appeals Has Construed the Railway Labor Act as Prescribing a Rule Contrary to Settled Common-Law Rules of Contracts

While collective bargaining agreements have been characterized in various ways, they nonetheless are contracts. *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 334-336 (1944). As contracts in the field of labor relations covered by an Act of Congress, they are governed by federal rather than state law. So this Court has expressly ruled on numerous occasions. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 457 (1957); *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 506-507 (1962); *Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, 102-104 (1962); *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 246 (1962). While these cases arose under Section 301 of the National Labor Relations Act, 29 U.S.C. § 185, which is not directly applicable here where the parties are governed by the Railway Labor Act, the same concept of federal law as the law to be applied obtains. *Larsen* v. *American Airlines, Inc.*, 313 F.2d 599, 602-603 (2d Cir., 1963). In *Lincoln Mills*,

supra, at 456-457, this Court said that the federal law of labor contracts is one "which the courts must fashion from the policy of our national labor laws," and undertook to outline the sources of that law. The Court summarized: "The range of judicial inventiveness will be determined by the nature of the problem."

It is necessary, therefore, that the Railway Labor Act be considered in light of the fact that it sanctions and is built around the collective agreement—a contract—as the focal point of the carrier-union relationship. The Court of Appeals has ruled—and the government and the unions here contend—that the Act requires a carrier to continue to perform its obligations under collective agreements notwithstanding the fact that the unions, by striking, have rejected those agreements at least for the duration of the strike.

This attributes to Congress an intention to embody in the Railway Labor Act a rule of contracts diametrically opposed to one of the most basic concepts of common law. This was stated in 5 WILLISTON, CONTRACTS § 1301 (Williston and Thompson rev. ed. 1937) as follows:

> "A promisor can no more be expected to perform his promise when it is clear that he is not going to receive counter-performance than when he actually has not received it. Baron Parke—a judge not likely to stretch too far the rules of the common law—so held in Ripley v. M'Clure [4 Ex. 345], and the law is clearly to that effect."

There can be no doubt that these common-law principles are applicable to labor agreements as a part of our federal common law of labor contracts. The Court of Appeals for the District of Columbia said so in *United Electrical Workers* v. *National Labor Relations Board,* 223 F.2d 338, 341 (D.C. Cir., 1955), cert. denied 350 U.S. 918 (1956), rehearing denied 351 U.S. 918 (1956):

> "It is general law that one party to a contract need not perform if the other party refuses in a material respect to do so. [Citing Williston.] And *that rule applies to labor contracts.*" (Emphasis supplied.)

This Court itself has applied common-law rules of contracts in federal labor cases. For example: *National Labor Relations Board* v. *Brown,* 380 U.S. 278, 287 (1965); *National Labor Relations Board* v. *Rockaway News Co.,* 345 U.S. 71, 79 (1953). They are regularly applied in the lower federal courts. *Boeing Airplane Co.* v. *Aeronautical Industrial District Lodge No. 751,* 188 F.2d 356 (9th Cir., 1951), cert. denied 342 U.S. 821 (1951); *United Biscuit Co.* v. *National Labor Relations Board,* 128 F.2d 771, 775 (7th Cir., 1942); *Boeing Airplane Co.* v. *National Labor Relations Board,* 174 F.2d 988 (D.C. Cir., 1949). They should be applied by this Court in the case at bar.

We do not question but that Congress can, subject to constitutional restrictions, prescribe any rule of railroad labor contract law it wants. But if and when it proposes to have applied rules radically different from those accepted at common law it should say so plainly. In the absence of such statement, the courts can only assume that it intended to have familiar rules of contract law applied.

Nothing in the Railway Labor Act expresses directly or indirectly an intent by Congress to adopt the unprecedented rule of contracts applied by the Court of Appeals and urged upon this Court by the government and the unions. That being the case, the rule which it must be assumed Congress approved, is that when unions strike a railroad any collective agreement theretofore in effect is either terminated altogether or suspended for the duration of the strike.

As a practical matter, it would make little or no difference whether the collective agreement were treated as terminated completely or as suspended for the duration of the strike. But, as Williston says, "... [W]ords have their importance. If wrongly used, wrong ideas are sure to follow, and wrong decisions follow wrong ideas." 5 WILLISTON, CONTRACTS § 1302 (Williston and Thompson rev. ed. 1937). We turn to Williston for the answer:

> "Neither where the plaintiff's excuse for his own nonperformance is the defendant's actual breach of the contract nor where that excuse is a prospective breach because of repudiation does the plaintiff terminate the contract merely by availing himself of his excuse. *The contract still exists, but one party to it has a defense and an excuse for non-performance.*" *Ibid.* (Emphasis supplied.)

Accordingly, the rule which this Court should read into the Railway Labor Act is that when a railroad union calls a strike the collective agreement between it and the carrier is suspended and the carrier is excused as a matter of law from complying with that agreement for the duration of the strike.

E. The Court of Appeals has Construed the Railway Labor Act to Express a Federal Labor Policy Contrary to the Policy Found by this Court and Courts of Appeals in Cases Arising Under the National Labor Relations Act

The Court of Appeals for the Fifth Circuit has, in its answer to the question here considered, construed the Railway Labor Act as evincing a policy of Congress contrary to the general policy of labor law found by this Court and by Courts of Appeals to have been expressed in the National Labor Relations Act.

The government has previously sought to distinguish cases arising under the National Labor Relations Act on two grounds—that the Act contains no *status quo* provisions comparable to those of the Railway Labor Act, and that collective agreements in the railroad industry are commonly of a continuing nature, remaining in effect until changed, unlike the usual agreements under the National Labor Relations Act which are effective for stated periods of time.

Neither of the bases relied on by the government to avoid the impact of National Labor Relations Act decisions is valid. First, no *status quo* provisions of the Railway Labor Act were in force when Florida East Coast undertook to resume operations on February 3, 1963, under temporary working conditions different from those effective prior to the strike. The dispute which resulted in the strike by the unions was a major one and the processes of the Railway Labor Act relating thereto had been exhausted. Second, the custom of having continuing collective agreements in the railroad industry compared with the practice of limited term agreements in industries covered by the National Labor Relations Act is a point of technical difference with no substantial legal distinction. As we have already pointed out, an otherwise continuing collective agreement under the Railway Labor Act becomes unenforceable when repudiated by a union strike—it is suspended for the duration of the work stoppage. Being suspended, it is of no more use to the union and its members than if it had expired by its own terms. It continues as the basis upon which a new collective agreement would be constructed but so does the agreement under the National Labor Relations Act which has expired.

Otherwise applicable decisions arising under the National Labor Relations Act cannot thus be wished away because they did not arise under the Railway Labor Act. Although

in these cases this Court and other courts considered specific provisions of the National Labor Relations Act, the decisions announced certain facets of our federal labor policy common to that Act and the Railway Labor Act as well. In *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 346 (1944), a case arising under the Railway Labor Act, this Court said:

> "Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States."

Through footnote reference, the Court cited *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514, 524-525 (1941), where it had called attention to the fact that the House Committee had recommended enactment of the National Labor Relations Act as "an amplification and clarification of the principles enacted into law *by the Railway Labor Act* and by § 7(a) of the National Industrial Recovery Act." H.R. Rep. No. 1147, 74th Cong., 1st Sess. 5 (1935). (Emphasis supplied.)

The very language quoted above from the *Telegraphers* case was subsequently quoted by this Court in *National Labor Relations Board* v. *American Insurance Co.*, 343 U.S. 395, 408 (1952), to expand on the meaning of "bargain collectively" as used in the National Labor Relations Act.

That the National Labor Relations and Railway Labor Acts are generally to be construed as being different forms of expression of essentially the same policy is attested by numerous opinions of this Court citing decisions under one or the other Act interchangeably and without reference to the particular Act which gave rise to the question being considered. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33, 45-48 (1937); *Termi-*

nal Railroad Assn. v. *Brotherhood of Railroad Trainmen,* 318 U.S. 1, 6, (1943); *National Labor Relations Board* v. *American Insurance Co.,* 343 U.S. 395, 402, 408 (1952); *Leedom* v. *Kyne,* 358 U.S. 184, 189-191 (1958); *National Labor Relations Board* v. *Insurance Agents Union,* 361 U.S. 477, 486 (1960); *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.,* 372 U.S. 284, 290 (1963).

With this background, we turn to a series of cases decided by this Court and Courts of Appeals other than the Fifth Circuit demonstrating the inconsistency between the opinion of the latter in this case and the prevailing national labor policy.

In two recent cases, the National Labor Relations Board has tried unsuccessfully to have the courts impose on industry generally a rule similar to that which the Court of Appeals has here pronounced for the railroads at the urging of the government and the unions.

Hawaii Meat Co. v. *National Labor Relations Board,* 321 F.2d 397 (9th Cir., 1963), involved an economic strike against a wholesale meat processor. As part of its effort to keep its business going during the strike, the company subcontracted its delivery work. The National Labor Relations Board found the company guilty of a refusal to bargain in violation of Section 8 (a) (5) of the National Labor Relations Act. As later quoted by the Ninth Circuit, the Board ruled, in pertinent part:

> " . . . [A]n employer fails to bargain and violates section 8 (a) (5) if, after a strike begins, he does not give the union an opportunity to bargain about this proposal to change the existing terms and conditions of employment among which, and not the least important, is the permanency of the job classifications which were held by employees when the strike began." 321 F.2d at 398.

With an eye on the *Fibreboard* case which was then on its way to and later decided by this Court, *Fibreboard Corp.* v. *National Labor Relations Board,* 379 U.S. 203 (1964), the court in *Hawaii Meat* said that for the purpose of its decision it would assume that, absent the strike, the employer would have been required to bargain regarding its decision to subcontract delivery work. 321 F.2d at 399. The court also said that it assumed that if the union so requested during the strike the employer would be obligated to bargain on the question whether the subcontracting arrangement would be continued after the strike had ended. *Ibid.*

Because it bears so directly on the instant case, we quote the four governing paragraphs of the Ninth Circuit's decision in *Hawaii Meat:*

> "Our answer is 'no' to the narrow question which is presented to us, namely, whether a decision to subcontract, taken at the time an economic strike occurs, and made for the purpose of keeping the plant operating, constitutes a failure to bargain as required by the Act, when, after the strike begins, the employer does not, on its own motion, offer the union an opportunity to bargain about the decision to subcontract. It is the decision to subcontract, not the matter of what is to be done with or for the employees who are displaced by subcontracting, that is here involved. As to the latter there is authority that it is a mandatory subject of bargaining; we express no opinion upon the question.
>
> "We think that when an employer is confronted with a strike, his legal position is, in some respects, different from that which exists when no strike is expected or occurs. No case holds that a struck employer may not try to keep his business operating; on the contrary, it is quite clear that he has the right to do so. He may not use the strike as an excuse for

committing unfair labor practices. (See, e.g., *NLRB* v. *United States Cold Storage Corp.*, 5 Cir., 1953, 203 F.2d 924) But it does not follow that what this employer did to meet the strike was an unfair labor practice, even though it might have been one in the absence of a strike.

"We think that a requirement that, upon the occurrence of a strike, and before putting into effect a subcontracting arrangement designed to keep the struck business operating, the employer must offer to bargain about the decision to subcontract, would effectively deprive the employer of this method of meeting the strike. A mere naked offer to bargain would not end the matter. The union could, by accepting the offer, deprive the employer of an effective means of meeting the strike for a period of time that might render it valueless to the struck employer. An employer is under no duty to offer to bargain, after a strike starts, about a decision to hire replacements for strikers, even on a permanent basis. (See *NLRB* v. *Mackay Radio & Tel. Co.*, 1938, 304 U.S. 333 . . .). . . ."

"We think it no more proper for the Board to intrude upon the decision of the employer, in a strike situation, to keep going by subcontracting, than to intrude upon a decision to replace, permanently, individual strikers. This, we think, is consistent with the philosophy expressed by the Supreme Court in *NLRB* v. *Insurance Agents' Union*, 1960, 361 U.S. 477, 488-498. . . . " 321 F.2d at 399-400.

On this basis, the Board's order was set aside and its petition to enforce denied. *Id.*, at 401.

The Board fared no better less than a year later when it took another of its orders, which had been based on its own holding in *Hawaii Meat*, to the Seventh Circuit. *National Labor Relations Board* v. *Abbott Publishing Co.*, 331 F.2d 209 (7th Cir., 1964), involved the labor troubles of a newspaper publisher and printer. Its organized employees

were divided into two groups, one in the "nonmechanical unit" and the other in the "mechanical unit." When both units went out on strike, the publisher subcontracted the work of the mechanical unit and managed to keep its plant in operation. The Board found the company guilty of a refusal to bargain and petitioned for enforcement of its order.

The Seventh Circuit declined enforcement and set the order aside. Citing the Ninth Circuit in *Hawaii Meat*, it said:

> "When the strike occurred on April 16, 1961, respondent met its obligation to its newspaper readers and advertisers and kept its plant in operation. Deadlines were met and editions were issued. Respondent refused to permit the strike to paralyze its operation. To meet the emergency thrust upon it by the union, the employer acted by contracting out its composing work. It was a result which was forced upon it by the union and we agree with the Trial Examiner that this action, without notifying or consulting with the union, was not a violation of § 8 (a) (5) of the Act. We are not convinced by the Board's order or its reasons to the contrary. Moreover, as a result of its experience in contracting out this work, respondent learned that it had found a cheaper way of handling this part of its business, as detailed by the Trial Examiner. Thus respondent continued its changed method of operation, by eliminating the use of certain of its machines.
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> * * * * *
>
> "We are not called upon in this case to decide whether, in a situation where no strike has been called and the bargaining table remains accessible to both parties the question of contracting out work by an employer is a subject of collective bargaining. Instead, we have a case where the union has turned its back on collective bargaining and has, by calling a strike, placed

> the employer suddenly in a position made precarious by the inexorable demands of newspaper publication. If publication may be interrupted while bargaining drags on over matters which have to do with what means the publisher may use in getting his paper on the streets and in the mail, the paper may cease to exist. It would be a startling doctrine indeed if this court were to tell companies and employers faced with extinction because of a strike, that before they can make economic business decisions to contract out work in order to continue operations, they must first consult the union that caused the threat of extinction." 331 F.2d at 213.

Another earlier case squarely in point and contrary to the Fifth Circuit decision here being considered is *Pacific Gamble Robinson Co.* v. *National Labor Relations Board,* 186 F.2d 106 (6th Cir., 1950). The employer involved was a wholesale distributor of fruit, vegetables, groceries, and other produce. It undertook to continue operation of its business notwithstanding an economic strike by its employees. To this end, it sought and succeeded in hiring replacement employees. It paid replacements more than had been paid to employees who had occupied the same jobs before the strike.

On these facts, the Board found the employer guilty of a refusal to bargain in violations of Sections 8 (a) (1) and 8 (a) (5) of the National Labor Relations Act.

The Sixth Circuit denied enforcement and set the Board's decision and order aside. It relied on this Court's opinion in *National Labor Relations Board* v. *Mackay Radio & Tel. Co.,* 304 U.S. 333 (1938), saying:

> "There is no requirement of law that the employer who rightfully hires replacements to continue his business after a strike should offer the replacements the same rate which has been offered the union." 186 F.2d at 109.

These cases stem not only from this Court's decision in *Mackay Radio, supra,* but more directly from *National Labor Relations Board* v. *Insurance Agents Union,* 361 U.S. 477 (1960).

The holding in *Mackay Radio* can be briefly summarized —an employer subject to the National Labor Relations Act does not violate the statutory duty to bargain while an economic strike is in progress by hiring replacement workers, even if they are hired on a permanent basis. Carried to the context of this case, *Mackay Radio* means that under the policy embodied in the National Labor Relations Act Florida East Coast quite properly undertook to use supervisors and replacements in its effort to operate its railroad notwithstanding the strike confronting it. That the doctrine of *Mackay Radio* is applicable to cases arising under the Railway Labor Act is attested by *Flight Engineers International Assn.* v. *Eastern Air Lines,* 243 F.Supp. 701, 707 (S.D. N.Y., 1965), pending on appeal to the Second Circuit.

The *Insurance Agents* case is even more important because its *rationale* is directed so closely to the problem of this case. There the employees undertook while negotiations for a new collective contract were in progress a program of harassing tactics. They did not actually go out on strike but refused to perform their day-to-day duties in the regular way. On complaint of the company, the National Labor Relations Board found the unions had failed to bargain in good faith.

This Court, ruling that the Board had erred in its construction of the National Labor Relations Act, relied heavily on the settled principle of "our labor policy" that Congress is not concerned with the substance of labor agreements apart from certain elementary proscriptions. 361 U.S. at 484, 485-486, 488, 490. In this connection, indicating the close policy ties between the National Labor Relations and Railway Labor Acts, the Court cited in its

support *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen,* 318 U.S. 1 (1943).

From this point, the Court proceeded in the *Insurance Agents* case to emphasize the mutual duty of bargaining in good faith imposed on the parties by the Act, observing that apart from that duty, ". . . Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *Id.,* at 488. Then it said:

> ". . . [T]he truth of the matter is that at the present stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between the parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side." 361 U.S. at 489.

In effect, the Court ruled that the order of the Board violated the principle that the federal government is not concerned with the substance of collective agreements. By limiting its choice of economic weapons, the Court said that the Board affected the union's economic strength and thereby the process of bargaining itself:

> "Thus the Board in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid. And if the Board could regulate the choice of economic weapons that may be used as a part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract." *Id.* at 490.

This, the Court said, was contrary to "our labor policy" which does not contemplate "government control of the results of negotiations." *Ibid.*

Subsequently in its opinion in *Insurance Agents* the Court again referred to the use of economic pressures as

"part and parcel of the process of collective bargaining." 361 U.S. at 495. Finally, it specified the reason why the National Labor Relations Act could not be construed to prohibit the particular form of economic pressure utilized by the Insurance Agents Union:

> Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions.... But the activities here involved have never been specifically outlawed by Congress." *Id.* at 498.

In the case at bar, the Court of Appeals has assumed a power under the Railway Labor Act which the Court in *Insurance Agents* ruled was not vested in the National Labor Relations Board by the National Labor Relations Act. Just as no specific proscription of the action of the union in *Insurance Agents* could be found, so no limitation on the right of carriers to adopt temporary changes in working conditions during a strike can be found in the Railway Labor Act.

National Labor Relations Board v. *Brown*, 380 U.S. 278 (1965), involved a lockout by members of an employer association of retail food stores when one of their number was struck by a union seeking to pursue the whipsaw tactic. While their employees were locked out, all members of the association continued to operate with temporary replacements. The employers further refused to use any regular employees who were willing to work rather than temporary replacements.

There was no doubt about the employers' right to use temporary replacements in view of *Mackay*, but the Board held that by locking out their employees and using temporary replacements the employers had violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. The Court of Appeals refused to enforce the Board's order.

This Court affirmed; citing the *Insurance Agents* case, it said: "We begin with the proposition that the Act does not constitute the Board as an 'arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.' " 380 U.S. at 283. To this it added:

> "In the absence of proof of unlawful motivations, there are many economic weapons which an employer may use that either interfere in some measure with concerted employee activities, or which are in some degree discriminatory and discourage union membership, and yet the use of such economic weapons does not constitute conduct that is within the prohibitions of either § 8 (a)(1) or § 8 (a)(3)." *Ibid.*

In conclusion, the Court said that section 8(a)(1) requires evidence of unlawful motivation and Section 8(a)(3) requires evidence of unlawful intent, neither of which could be found with little more than evidence of resort to a lookout and use of temporary employees.

We read the case as reinforcing our contention that the broad scope of the self-help of employers under strike conditions is not to be limited by the government in the absence of express or plainly implied statutory restrictions.

Next is *American Ship Building Co.* v. *National Labor Relations Board,* 380 U.S. 300 (1965). The employer and the union had engaged in bargaining over the terms of a new collective agreement. The old agreement expired but there was no strike and operations and negotiations continued. Eleven days after the old agreement had expired the union had not struck, but the parties had reached an impasse. The employer seized the initiative and locked its employees out. In its notices to employees, the employer stated that its action was taken because of the unresolved labor dispute and that each employee was "laid off until further notice." 380 U.S. at 304.

The National Labor Relations Board found that the sole purpose of the employer's lockout was to exert economic pressure to secure prompt settlement of the dispute on favorable terms. 380 U.S. at 305. On this basis, it ruled that the employer had violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. The Court of Appeals for the District of Columbia granted the Board's petition for enforcement.

This Court reversed. The issue before it was carefully narrowed:

> "What we are here concerned with is the use of a temporary layoff of employees solely as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached." 380 U.S. at 308.

The Court made it clear that the use by an employer of a lockout is not to be condemned under the Act as *per se* unlawful in spite of the economic disadvantage it might cause employees:

> "The lockout may well dissuade employees from adhering to the position which they initially adopted in the bargaining, but the right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage. Proper analysis of the problem demands that the simple intention to support the employer's bargaining position as to compensation and the like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful." *Id.* at 309.

In connection with its ruling that the employer's lockout standing alone did not constitute discrimination to

discourage union membership in violation of Section 8(a)(3), the Court said:

> ". . . [W]e have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership . . . . Such a construction of § 8(a)(3) is essential if due protection is to be accorded the employer's right to manage his enterprise. . . ." *Id.* at 311.

The Court rejected the Board's contention that in its order it had exercised its special competence in labor matters to strike a balance between the bargaining strength of unions and employers. The board had listed the "other weapons" given the employer to "counterbalance the employees' power of strike." *Id.* at 316. Included was the right of the employer—of singular significance to the case at bar—to "institute unilaterally the working conditions which he desires once his contract with the union has expired." *Ibid.* The Board took the position that these "weapons" resulted in the employer being "adequately equipped with tools of economic self-help." *Ibid.*

Describing the action of the Board, the Court said,

> "In this case the Board has, in essence, denied the use of the bargaining lockout to the employer because of its conviction that use of this device would give the employer 'too much power.' In so doing the Board has stretched §§ 8 (a)(1) and (3) far beyond their functions of protecting the rights of employee organization and collective bargaining." *Id.* at 317.

Concluding, the Court ruled:

> "We are unable to find that any fair construction of the provisions relied on by the Board in this case can support its finding of an unfair labor practice. Indeed, the role assumed by the Board in this area is funda-

> mentally inconsistent with the structure of the Act and the function of the sections relied upon. The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress. Accordingly, we hold that an employer violates neither § 8(a)(1) nor § 8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position." *Id.* at 318.

There can be no more drastic unilateral change in conditions on the part of an employer than a lockout like that involved in the *American Ship Building* case. The National Labor Relations Board tried to outlaw the lockout by an employer where its sole purpose was to bring economic pressure to bear on a union after an impasse had been reached in collective bargaining. This Court rejected that effort because Congress did not intend to empower the Board to limit employers in their choice of economic weapons.

Here the Court of Appeals has done what this Court ruled the National Labor Relations Board could not do in *American Ship Building*. This attempt by the court below should be rejected here as that of the Board was rejected there.

F. The Court of Appeals Has Construed the Railway Labor Act Contrary to the Intent of Congress Therein to Avoid Interruptions to Commerce and the Operations of Carriers, and to Make Carriers and Unions as Equal as Possible in the Processes of Bargaining

The purpose of our scheme of regulations of labor relations is to preserve industrial peace and avoid interruptions to commerce by equalizing insofar as possible the rela-

tive positions of the parties to labor disputes. *Brotherhood of Railway Clerks* v. *Assn. for the Benefit of Non-Contract Employees,* 380 U.S. 650, 658 (1965); *Virginian Railway* v. *System Federation No. 40,* 300 U.S. 515, 547 (1937); *American Ship Building Co.* v. *National Labor Relations Board,* 380 U.S. 300, 315-317 (1965). Thus, Section 2(1) of the Railway Labor Act, 45 U.S.C. § 152 (1), states as the first of the five "General Purposes" to be served by the Act:

> "To avoid any interruption to commerce or to the operation of any carrier engaged therein. . . ."

The construction given the Act by the Court of Appeals in this case and urged by the government and the unions flies in the teeth of the congressional purpose of seeking to avoid interruptions to commerce or the operations of carriers and is inconsistent with the intent that carriers and employees should be treated as equals in the handling of disputes covered by the Act.

Any plan to compel a carrier to cease operating completely or nearly so when its employees choose to strike would be a curious way of discouraging interruptions to commerce or to carrier operations. This is particularly clear when there is available an alternative permitting carriers to operate as best they can for the duration of a strike under working conditions temporarily different from those specified in collective agreements applied before the strike.

Given these choices, which did Congress intend to adopt in the Railway Labor Act? If it meant what it said about seeking to avoid interruptions to commerce or carrier operations, the only answer is the outlined alternative. Carriers faced with strikes must be free to operate to the extent they can with supervisory and replacement employees working for the duration of the strike under temporary conditions different from those provided

in collective agreements applicable before the strike. This plan best serves the purpose of avoiding strike interruptions of commerce and carrier operations while at the same time leaving unions and those they represent free to exercise their right to self-help in the form of a strike.

Likewise, the construction of the Act followed by the Court of Appeals and urged by the government and the unions is inconsistent with the intent of Congress that carriers and unions representing their employees should be on as equal footings as possible in their handling of major disputes. They would have this Court rule that striking unions are entitled to reject in their entirety for the duration of the strike the provisions of collective agreements previously applicable. At the same time, they contend that carriers faced with work stoppages continue to be bound by all of the provisions of pre-strike collective agreements. All would agree that a carrier can make such changes as the unions agreed to or which were carried through the entire gamut of the Act's major dispute procedures. The Court of Appeals alone would permit carriers to make such changes as a court of competent jurisdiction determined were "reasonably necessary" to make a "meaningful reality" of their right to operate or try to operate under strike conditions.

There is no need to elaborate on the obvious discrimination this view of the law would work against carriers and in favor of unions in the handling of major disputes. Surely, Congress cannot be taken as having intended such discrimination in the absence of a clear statement directly or by unavoidable implication so indicating, particularly when such intention is contrary to the necessarily implied intention already recognized by this Court of treating carriers and unions alike insofar as possible.

G. The Railway Labor Act, Strictly Construed as a Criminal Statute, Does Not Support the Interpretation of the Court of Appeals

While we believe that the ordinary rules of construction of Acts of Congress lead inevitably to the construction of the Railway Labor Act we herein propose, it should be pointed out, as the unions state at page 12 of their Petition for Writ of Certiorari in No. 750, that: "Unlike the National Labor Relations Act. . ., the Railway Labor Act provides sharp 'teeth' for violations of its prohibitions." They then quote Section 2, Tenth, of the Act, 45 U.S.C. § 152, Tenth, which makes violations of certain paragraphs or sub-sections of Section 2 misdemeanors on the part of the offending company, its officers or agents, and provides for fines of not less than $1,000 nor more than $20,000 for each offense, with each day of violation constituting a separate offense.

Florida East Coast operated or tried to operate under working conditions different from those provided in collective agreements in effect prior to the strike from February 3, 1963 through October 30, 1964—a total of 637 days. The courts below have held that it violated the Railway Labor Act in doing so. Under Section 2, Tenth, of the Act, there were, therefore, 637 separate offenses chargeable against the carrier and its responsible officers and agents.

We take it that these would constitute 637 separate offenses per collective agreement unilaterally but temporarily changed. There were at least 15 separate collective agreements involved (11 with non-operating and 4 with operating unions), so there would have been 9,555 separate violations. This means—if the courts below were right—that Florida East Coast and its responsible officers and agents were and perhaps are subject to fines of not less

than $9,555,000 nor more than $191,100,000, with the officers and agents further subject to imprisonment for terms not to exceed 4,777 years and 6 months.*

Criminal statutes are, as this Court has repeatedly observed, to be strictly construed. In *United States* v. *Resnick,* 299 U.S. 207, 209-210 (1936), not only was this general rule restated, but the Court went further to state that the failure of Congress expressly to permit certain activity in a relevant criminal statute is not to be taken as prohibiting it. This rule of construction is a product of the basic principle that: "... [T]here are no common-law offenses against the United States, ... before a man can be punished as a criminal under the federal law his case must be 'plainly and unmistakably' within the provisions of some statute ...." *United States* v. *Gradwell,* 243 U.S. 476, 485 (1917). The test to be applied in the instant case is that applied in *United States* v. *Universal C. I. T. Credit Corp.,* 344 U.S. 218, 221-222 (1952), involving criminal charges of violations of the Fair Labor Standards Act:

> "... [W]hen choice has to be made between two readings of what conduct Congress had made a crime, it is appropriate before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication."

The case at bar is, to be sure, a civil suit for equitable relief. The applicable statute nonetheless remains a

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* It may be that no violations could be found while the actions of Florida East Coast were, in effect, sanctioned by the stay issued March 17, 1964, by the Court of Appeals against the preliminary injunction issued by the District Court in the *Trainmen's* case. In that event the minimum fine would be only $6,630,000, and the maximum $132,600,000, with the maximum jail term 3,315 years.

criminal one and must be strictly construed. While the burden of proof in a civil suit like this is different from that which would be required in a criminal case, the statute must be given the same meaning whether the particular form of action is criminal or civil. See *United States* v. *Universal C.I.T. Credit Corp., supra,* at 222. Burden of proof relates only to the problem of establishing the facts. Here, as in other cases which might follow later, there is and would be little or no question about the facts. The central issue would remain one of law. Accordingly, the manner in which this Court construes the Railway Labor Act here will control any later efforts to enforce the provisions of the Act involved through application of criminal sanctions.

The District Judge, in his Conclusion of Law No. 7, found that Florida East Coast, in deviating from the working conditions specified in collective agreements in force prior to the strike, violated Sections 2, First, Second, and Seventh; Section 5, First; and Section 6 of the Railway Labor Act, 45 U.S.C. §§152, First, Second, Seventh; 155, First; 156. (R. 188.) This Finding was affirmed by the Court of Appeals.

We submit that unless this Court would affirm criminal convictions of Florida East Coast and its responsible officers and agents on the basis of the same reasoning adopted by the courts below, the decision of the Court of Appeals must be reversed. Since the Railway Labor Act manifestly does not "plainly and unmistakably" proscribe the actions of Florida East Coast, criminal convictions for violations of the Act would be out of the question. We perceive, therefore, no alternative to reversal of the Court of Appeals.

H. The Court of Appeals Erred in Basing Its Decision on One Phrase of One Section of the Railway Labor Act; Read as a Whole, the Act Contradicts the Conclusion of the Court of Appeals

The decision of the Court of Appeals and the contentions of the government and the unions that a struck carrier violates the Railway Labor Act when it unilaterally institutes temporary changes in working conditions as applied under collective agreements prior to the work stoppage rests primarily on a narrow construction of one part of Section 6 of the Act. This construction is at one and the same time too literal and yet not literal enough.

It is too literal in that it does not adequately take into account, among other things, the purposes or policy of the Act and other related legislation, the evident intent of other sections of the Act, the legislative history of the Act read in the light of accepted practices, or settled concepts of contract law. It is not literal enough because it emphasizes out of all proportion only one part of Section 6 at the expense of other parts which when read strictly would not proscribe the action of Florida East Coast found unlawful by the Court of Appeals.

Section 2, Seventh, of the Railway Labor Act, 45 U.S.C. § 2, Seventh, reads as follows:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class *as embodied in agreements* except in the manner prescribed in such agreements or in section 6 of this Act." (Emphasis supplied.)

While the Court of Appeals, the government and the unions all emphasize the first part of this section that no "change" shall be made in "rates of pay, rules, or working conditions" except in the manner provided by Section 6, we would like to emphasize that what is forbidden are changes

of rates of pay, rules, or working conditions "as embodied in agreements."

Here, as we have so repeatedly stated, the changes which we assert a carrier faced with a strike, including Florida East Coast, is free to make under the law are temporary changes as defensive measures of self-help to be effective only for the duration of the strike. Changes of this character are not changes in "rates of pay, rules, or working conditions of . . . employees, *as a class as embodied in agreements . . . .*" *St. Louis, San Francisco and Texas Ry. Co.* v. *Railroad Yardmasters,* 328 F.2d 749, 752 (5th Cir., 1964); cert. denied 377 U.S. 980 (1964); *Switchmen's Union* v. *Central of Georgia Ry. Co.*, 341 F.2d 213 (5th Cir., 1965). The statute is directed against attempted unilateral permanent changes in collective agreements. It does not purport to cover or limit a carrier's right to resort to self-help, to make such temporary changes as it deems necessary for it to operate as best it can during the strike.

Section 2, Seventh, incorporates by reference and directs attention to Section 6 of the Act, 45 U.S.C. § 156. The latter requires carriers and unions to give each other 30 days' written notice of proposed changes in rates of pay, rules, or working conditions. Conferences between the parties are called for, to be followed possibly by mediation under the auspices of the National Mediation Board. Then it reads:

> ". . . rates of pay, rules, or working conditions shall not be altered by the carrier *until* the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board." (Emphasis supplied.)

The Court of Appeals, the government and the unions emphasize the first part of Section 6 requiring written

notice of intended changes. We rely on the part quoted which expressly authorizes a carrier to change "rates of pay, rules, or working conditions" after "the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

This authority to make changes in collective agreement provisions specifically extended to carriers does not purport to—and cannot be—limited to controversies in which the carriers are moving parties seeking through service of written notice to make changes. It would apply whether changes were proposed by carriers or by unions.

It is clear that Section 6 of the Act contemplates changes in conditions by carriers and nothing purports to limit that right to changes originally proposed by them. If Congress had intended such limitation, it could very easily have said so. A fair reading of the words of this section indicates on the contrary an intention to authorize carriers to make defensive changes in working conditions as required to meet any offensive measures initiated by unions.

This construction is bolstered further by that portion of Section 5 of the Act referred to in the second sentence of Section 6. In Section 5, First, provision is made for proffers of arbitration by the Mediation Board. It states that if arbitration is refused by one or both parties the Board shall give notice to the parties that its efforts at mediation have failed. The section then continues:

> ". . . [F]or thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

By providing that during the 30-day period specified no changes shall be made in rates of pay, rules, or working conditions or established practices in effect prior to the dispute, Congress necessarily approved the institution of changes after expiration of the 30-day period. And again—as in Section 6—it did not undertake to limit the right to make changes to the moving party. The necessary implication is that Congress intended to treat the two parties to disputes covered by the section alike, neither to be preferred over the other. It meant to leave unions free to press their demands by resorting to strikes, with the carrier to be free to make such temporary defensive changes in conditions as it deemed necessary for it to exercise its right to self-help. At the same time, carriers were to be free after the 30-day cooling-off period without appointment of an emergency board to implement any changes they had formally proposed, with the unions allowed to strike in their exercise of their defensive right to resort to self-help.

The language of Section 10 of the Act, 45 U.S.C. § 160, referred to in Section 5, First, also supports this construction of the Act. After providing for appointment by the President of emergency boards to investigate and report on threatened railroad strikes which would "substantially . . . interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," Section 10 states:

> "After the creation of such board, and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

Here too the sense of the language used envisions the parties to the dispute as equals. Rather than purporting to restrict one party or the other with respect to making changes in the "conditions out of which the dispute arose,"

Section 10 contemplates on its face that if the parties to a dispute are unable to resolve it within thirty days after an emergency board report both shall be free to make changes in the "conditions out of which the dispute arose."

The decision of the Court of Appeals and the contentions of the government and the unions would mean that after the expiration of the cooling-off period following an emergency board report, with no settlement agreement having been reached, the conditions out of which the controversy arose can be changed by the unions calling a strike without violating the Railway Labor Act. But, this view continues, carriers party to the dispute are required by the Act to carry on as before if they are going to make any attempt to operate as a part of the self-help which they are entitled to exercise.

This construction not only is not required by but is contrary to the wording and sense of Section 10.

We quote again this statement from the Court's opinion in *National Labor Relations Board* v. *Insurance Agents Union,* 361 U.S. 477, 498 (1960):

> "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions. . . . But the [harassing] activities here involved have never been specifically outlawed by Congress."

Nothing in the Railway Labor Act specifically precludes carriers faced with strikes from making unilateral temporary changes in working conditions necessarily required to enable them to operate or attempt to operate pursuant to their common-law and statutory duty to provide transportation service to the public. Accordingly, the construction of the Act to the contrary by the Court of Appeals cannot stand. And, appraised as an Act carrying criminal sanctions which must be strictly construed, then *a fortiori* the interpretation of the Court of Appeals must be rejected.

I. Legislative History Tends to Confirm Rather than Contradict a Construction of the Railway Labor Act Releasing Carriers from the Obligations of Collective Agreements During Strikes

There is nothing in the legislative history of the Railway Labor Act affirmatively indicating an intention that carriers should be released from the obligations of collective agreements for the duration of strikes. This does not mean, however, that this history provides no guideposts or signals whatever regarding the intention of Congress.

First, the approach of the government and the unions to this history is wrong. Considering, as we have previously indicated, that the Act was superimposed on a system of bargaining under which there was no indication that carriers were to continue bound by collective agreements when their employees struck, the correct line of inquiry should be whether anything in the history of the Act manifested an intent to impose on carriers a restriction theretofore unknown. Pursuit of that inquiry discloses no evidence of such intent. This supports the conclusion that Congress did not mean in the Act to require carriers to apply prestrike collective agreements during work stoppages.

Secondly, the view of legislative history relied on by the government and the unions does not take into account the failure of Congress to take steps to curb the practice of carriers of instituting temporary working conditions during strikes. Indeed, the record is bare of any indications of complaint to Congress by the unions on this score. This too tends to confirm approval by Congress of the practice which the Court is asked to condemn.

In an unusual footnote appearing on pages 13-14 of its Petition for Writ of Certiorari in No. 782, the government undertakes to refer to legislative history. It cites

one part of the history of the Transportation Act of 1920 which act was later discarded because it was unsatisfactory in favor of the Railway Labor Act of 1926. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U.S. 30, 40 (1957). Then it cites one page from the Congressional Record of 1926 to support its assertion that Congress "very likely . . . assumed" that railroad strikes would "cease," followed by an observation without support of any citation to the effect that Congress assumed as an alternative that "any strike would be accompanied by a total cessation of service."

Passing the patent *non-sequitur*, we can say that the Act on its face and as construed by the courts, together with its legislative history, dispels any notion that Congress "very likely . . . assumed" that its enactment would mean the end of railroad strikes. Undoubtedly, Congress hoped that the Act might be the means through which many or possibly even nearly all railroad strikes could be thereafter avoided, but it certainly knew better than to assume that all strikes would cease. For that very reason the possibilities of strikes were specifically contemplated by Sections 6; 5, First; and 10 of the Act—reviewed at length above. S. Rep. No. 606, 69th Cong., 1st Sess. 5 (1926); *Hearings before the Committee on Interstate and Foreign Commerce on H.R. 7180*, 69th Cong., 1st Sess. 94, 290-291 (1926); 67 Cong. Rec. 4524, 4587-4588, 4651, 4657, 8815, 8892 (1926).

As for the alleged assumption by Congress that any railroad strike "would be accompanied by a total cessation of service," we can only profess amazement that such a statement going to the heart of the central issue of the case could or would be advanced without a single supporting citation to the Act itself, to legislative history, to judicial decision, or to legal texts or articles. This apparent void

of authority eloquently confirms our view that the government's case (and the unions' as well) rests on a foundation of quicksand. How can it square this alleged assumption with Congress' express statement in Section 2 (1) of the Railway Labor Act, 45 U.S.C. § 152 (1), that one of its principal purposes was to avoid interruptions to commerce or the operations of carriers engaged therein?

In a similar vein, at pages 14-15 (and in note 9 on the latter page) of its Petition for Writ of Certiorari, the government says in effect that carriers should not attempt to operate in the face of a strike because other means of self-help are available. The only other means referred to, however, is "industry-wide strike insurance," which is said to be "of considerable potential effectiveness." To this we need only say that such insurance would be of small comfort to those dependent on a struck carrier for rail transportation service—those whose interests were of such concern to Congress in the Railway Labor Act.

What the government overlooks is that in a dispute such as that between Florida East Coast and the unions "More is involved than the settlement of a private controversy without appreciable consequences to the public." *Virginian Railway* v. *System Federation No. 40*, 300 U.S. 515, 552 (1937). The public is primarily concerned with maintenance of rail transportation service. It is apparent, therefore, that the construction of the Act advocated by the government and the unions, adopted (with an important exception) by the Court of Appeals, is contrary to the public interest. On the other hand, that urged by Florida East Coast and the railroad industry would serve the public interest to the maximum extent possible consistent with having railroad strikes at all—and unless and until Congress adopts a plan for governmental adjudication of ma-

jor as well as minor labor disputes in the railroad industry there are unfortunately going to be railroad strikes.

J. While the Unions Remain the Bargaining Agents for Crafts or Classes Represented Before the Strike, This Does Not Impair the Right of Carriers to Make Unilateral Temporary Changes in Conditions for the Duration of the Strike

The Court of Appeals ruled that the unions remain the bargaining agents for the crafts or classes of employment represented before the strike. 336 F.2d at 180.

Even so, however, and even if there were no limitations to this rule, it does not affect the right of carriers to make unilateral temporary changes in working conditions as defensive measures to counter union strikes. The unions may technically remain the bargaining agents for all in the crafts or classes represented before the strike—non-strikers as well as strikers—and they may continue as such agents until the strike is settled or they are replaced by other unions. But this does not affect the status of their pre-strike collective agreements with the carrier. By striking, the unions repudiate those agreements, refusing for the duration of the strike to carry out their obligations thereunder. The agreements are, therefore, suspended—unenforceable for the duration of the work stoppage. Accordingly, as long as the strike lasts the unions do not lose their status as statutory representatives empowered to negotiate new agreements, but in the interim they have no enforceable existing agreement. They are—as it were—unions without portfolio.

Under these circumstances, Florida East Coast was free—again for the duration of the strike—to supersede the col-

lective agreement by working conditions negotiated individually with employees who worked during the strike. *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342 (1944), relied on by the Court of Appeals, 336 F.2d at 180, is clearly inapplicable. It involved an effort by a carrier to change working conditions unilaterally notwithstanding a current and enforceable collective agreement.

K. Consideration of the Consequences of the Decision of the Court of Appeals Requires that Its Construction of the Railway Labor Act Be Rejected

The National Mediation Board, as required by Section 4, Second, of the Railway Labor Act, 45 U.S.C. § 4, Second, has reported annually to Congress since 1935 on the state of railroad labor relations. Even a hasty review of those reports indicates the unfortunate frequency of railroad strikes. While most are of short duration, there have been a number which continued for more or less extended periods. The mere fact that there are so many to which the law as announced by the courts below and as urged by the government and the unions would be applied dictates the necessity of a careful evaluation of the consequences of letting the decision of the court below stand or accepting the contentions of the government and the unions.

The courts below, the government, and the unions are all agreed that at least at the inception of a strike a carrier continues to be bound by all of the working conditions contained in collective bargaining agreements in effect prior to the strike. They do not come to a parting of the ways until later, when the courts say the carrier can be excused from certain provisions of the collective agreement on a showing of reasonable necessity, while the government and the unions contend that no departures from the

collective agreement—even temporary ones—can be permitted during the strike unless and until the carrier has exhausted the steps prescribed by the Railway Labor Act for the handling of major disputes.

The position of the government and the unions offers some interesting and not at all fanciful prospects.

At the moment of a strike, we may assume that almost all organized employees in the operating and non-operating crafts of the target carrier walk off their jobs when their tours of duty are finished, and those who are supposed to relieve them do not report for work. In short order the operations of the carrier grind to a halt. Supervisors are not to be permitted to operate any trains or perform any clerical functions because such would be contrary to the collective agreements on which the striking employees and their non-working sympathizers turned their backs.

So—trainloads of passengers would be left stranded to fend for themselves in cities, towns, and hamlets. These trains might well be carrying military personnel exclusively. U.S. Mail and express carried on regular passenger trains would fare no better than the passengers. Indeed, entire trains devoted to transportation of mail and express would be stopped. Carloads of perishables would be left standing where they were when the train crews reached the end of their particular runs. This might be somewhere on the main line or perhaps on a siding or in a yard. Carloads of materials essential to national defense would be similarly treated.

This is where the government and the unions would have matters stand for the duration of the strike or until the carrier either found replacement employees to work under the rates of pay, rules and working conditions applicable prior to the strike or pursued through the major dispute

processes of the Railway Labor Act proposed temporary changes in the collective agreement that would allow it to move stranded passengers, troops, mail, express, perishables and defense materials to destination or to connecting lines.

This bargaining requirement the government and the unions claim is imposed by the Railway Labor Act on a carrier which seeks to exercise its right to self-help in a strike situation presents an interesting picture. They are here contending that, despite the existence of a strike, the law compels a carrier to follow the major dispute provisions of the Act before making any changes whatever in working conditions established by collective agreements. They are thereby asking this Court to rule that a railroad with a strike on its hands cannot make temporary changes in working conditions as a part of its exercise of its right of self-help without first serving at least 30 days' notice of the intended changes on the striking unions and thereafter pursuing the prescribed steps of negotiation, mediation, and possibly arbitration or proceedings before an Emergency Board convened by the President under Section 10 of the Railway Labor Act. This would place the carrier in the position of seeking from the striking unions agreement upon measures to be utilized by the carrier in combating the strike. We confess to a certain skepticism about the carrier's prospects of success in such an undertaking.

The government and the unions are not alone in this extraordinary view. It was, in fact, adopted by the Court of Appeals, modified only to the extent that the court would allow a carrier to secure judicial consent to such limited departures from rates of pay, rules and working conditions contained in collective agreements as it could prove were "reasonably necessary" to make a "meaningful reality" of its right to exercise self-help. 336 F.2d at 182.

As the law now stands—at least in the Fifth Circuit—a carrier's right to resort to self-help in resisting a strike is limited to such departures from working conditions contained in collective agreements applied prior to the strike as a court determines are "reasonably necessary" to make a "meaningful reality" of the right to resort to self-help. 336 F.2d at 182.

Self-help is a right reserved, of course, to carriers and their employees alike. As the Court of Appeals observed in the suit by the Trainmen, the self-help to which employees resort is the strike, while that available to carriers is a right to operate or try to operate notwithstanding a strike. 336 F.2d at 181. The one is the corollary of the other. If the right of the carrier is to be restricted as the Court of Appeals has held, can it any longer be assumed that the employees' right to strike has no limits?

The essence of the employer-employee relationship is the employer providing the opportunity and the employee performing the work. The charter governing that relationship is the collective agreement contemplated and sanctioned by the Railway Labor Act—if, that is, the employees elect to bargain collectively. When the employee refuses to work in the course of his exercise of his right to strike he has gone as far as he can go towards breaching the employment relationship short of severing it altogether by resigning. In going on strike he rejects the collective agreement as an unsatisfactory charter for the employment relationship.

If a railroad employer is not to be permitted under the law to treat as completely but temporarily suspended a collective agreement which striking employees have rejected, is it not fair to inquire whether the law sanctions a total rejection of the collective agreement by striking

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employees? It may be that Section 6 of the Railway Labor Act, 45 U.S.C. § 156, forbids a union bent on exercising its right of self-help to ignore altogether its obligations under the collective agreement. Perhaps the law requires it to apply to a court for a determination of how far it must be authorized to avoid its obligations under the collective agreement in order to make a "meaningful reality" of its right to strike. A court might find that a complete cessation of work was not reasonably necessary. Instead, it might direct that refusal to work an hour or two a day, a day or two a week, or a week or two a month would be sufficient to make a "meaningful reality" of the union's right to strike.

We hasten to add that we do not believe this to be the law. But it should be if the decision of the Court of Appeals in the case at bar is affirmed by this Court.

We should also point to the doubt that the decision below may cast on the "right" of non-striking employees to refuse to cross the picket lines of their striking brothers. If the non-strikers have no dispute of their own on which the major dispute processes of the Act have been exhausted, how can they repudiate their own collective agreement by refusing to perform their regular duties? Is a lawful strike by one union to be considered a lawful excuse for all other employees to refuse to work? Nothing in the Railway Labor Act provides such an excuse. Perhaps under the law of the case at bar to date non-strikers must serve Section 6 Notices and pursue the major disputes procedures of the Act to seek temporary carrier agreement to their refusal to cross the picket lines of striking employees.

This analysis highlights another aspect of the law of this case to date that is curious at best. Collective bargaining agreements are, as we have pointed out, contracts. The Court of Appeals has ruled in this case that Florida

East Coast continues to be bound by all the provisions of a collective agreement despite the fact that the other parties to the agreement—the striking non-operating unions—have repudiated it. This unprecedented holding is framed against a back-drop of a lawful work stoppage by the striking unions. This is deceptive and may lend an unwarranted sense of reasonableness to the view that a carrier confronted by a strike continues bound by provisions of previously applicable collective agreements with striking unions. Based as it is on a very literal reading of a part of Section 6 of the Railway Labor Act, 45 U.S.C. § 156, this construction of the law should—if it is sound—apply whether or not the strike were lawful. This would mean that a railroad paralyzed by an unlawful work stoppage, against which—for one reason or another—it could not secure or did not want injunctive relief, would still be obligated to apply all of the working conditions contained in its collective agreement with the union engaged in the unlawful strike. This would be just one of the products of the construction of Section 6 advocated by the government and the unions, and adopted in part by the Court of Appeals.

L. Florida East Coast Experience Since Re-institution of Pre-strike Conditions Could Not Justify Construction of Railway Labor Act by Court of Appeals

We have not overlooked the fact that since October 30, 1964, Florida East Coast has actually been operating under pre-strike conditions, with minimal exceptions. This is no answer to our complaints. Nor does it mean that requiring a carrier to apply such working conditions in the face of a strike would not materially impede its exercise of its right of self help. By October 30, 1964, when it reinstated the old working conditions, Florida East Coast

had been operating under special temporary conditions for 21 months. By that time it had secured all the replacement employees it wanted.

What the experience of Florida East Coast in this respect does show—and all it shows—is that after 21 months of operating under temporary strike conditions the carrier was able somehow to restore pre-strike working conditions. It does not show that on February 3, 1963, or thereafter, the carrier could have resumed service if it had been required at that time to operate under pre-strike conditions. On the contrary, the uncontradicted testimony in the record reflects the enormous difficulties that would have confronted the carrier if it had been required to adhere to pre-strike conditions when it undertook to restore service in February 1963. (R. 303, 311, 329-330, 381-382, 389-390, 393-394.)

A study of the Annual Reports of the National Mediation Board discloses a number of railroad strikes each year. In almost all of these, it has been the practice for the carrier to try to operate despite the strike. With few exceptions, the strikes are so short that there is no opportunity to attempt to recruit and use replacements, but this has also been the practice in most strikes which extended beyond a few days.

Again bearing in mind that the general practice of the industry undoubtedly followed in most, if not all, of these strikes was precisely the same as that undertaken by Florida East Coast on February 3, 1963, we see that these strikes and the disputes underlying them were resolved in due course. This experience demonstrates that any apprehensions about weakening collective bargaining if carriers are not required to apply pre-strike working conditions are baseless.

VI. CONCLUSION

The Court of Appeals has introduced a new rule or concept into the field of labor relations in the railroad industry governed by the Railway Labor Act overturning a settled practice followed for many years. If permitted to stand this decision will seriously impair the delicate balance between carriers and their employees in the area of collective bargaining which it has been the policy of our national labor laws to establish and protect.

We respectfully submit that for all the reasons herein stated the decision of the court below should be reversed.

Respectfully submitted,

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I hereby certify that the foregoing brief has this day been served on each party to this case by mailing copies thereof to the respective counsel of record at their post office addresses as hereafter listed, air mail postage prepaid.

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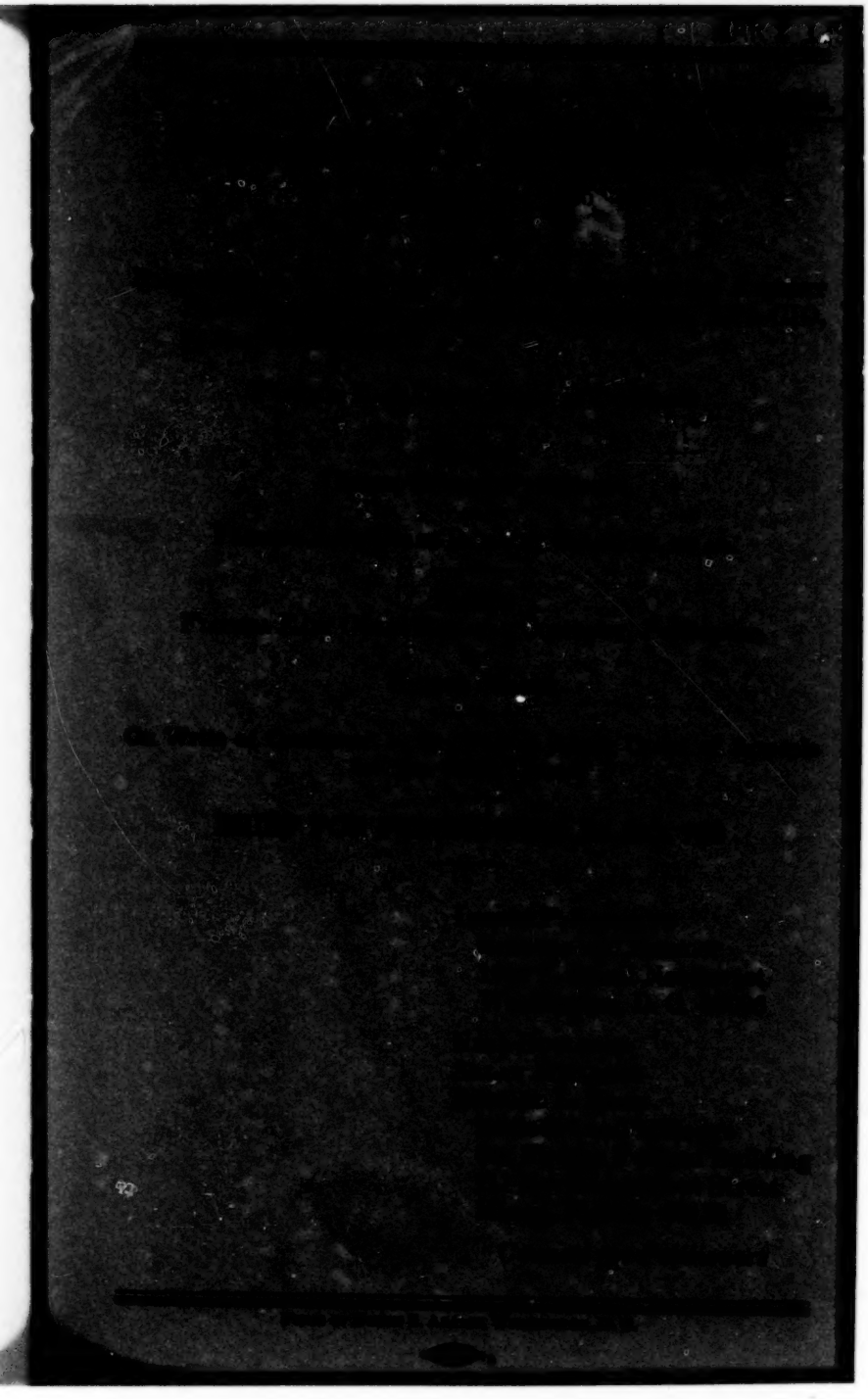
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 750

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, ET AL., *Petitioners,*

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 782

UNITED STATES, *Petitioner,*

v.

FLORIDA EAST COAST RAILWAY COMPANY, ET AL.

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, *Petitioner,*

v.

UNITED STATES

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS IN NO. 750

OPINIONS

The opinion of the United States Court of Appeals for the Fifth Circuit is officially reported at 348 F. 2d 682 and is unofficially reported at 59 LRRM 2854; it is reprinted at R. 903-911. The findings of fact and conclusions of law and the injunction of the United States

District Court for the Middle District of Florida, Jacksonville Division, are not officially reported, but the findings of fact and conclusions of law are unofficially reported at 57 LRRM 2618-2622. The findings of fact of the District Court appear in the printed record, Volume I, at R. 180-186; the conclusions of law of the District Court appear in the printed record, Volume I, at R. 186-189; and the preliminary injunction issued by the District Court appears in the printed record, Volume I, at R. 189-191.

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1965 (R. 911). Mr. Justice Black thereafter, by orders dated October 15, 1965 (R. 912), and November 18, 1965 (R. 913), extended the time for filing a petition for a writ of certiorari to and including November 29, 1965. The petition for writ of certiorari in Case No. 750 was filed on November 18, 1965; the petitions in Nos. 782 and 783 were filed on November 29, 1965. This Court granted the three petitions on January 24, 1966, and ordered the cases consolidated. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. Title I of the Railway Labor Act, as amended, 45 U.S.C. 151-163 [44 Stat. 577 (1926), 48 Stat. 926 (1934), 48 Stat. 1185 (1934), 49 Stat. 1921 (1936), 54 Stat. 785, 786 (1940), 62 Stat. 991 (1948), 63 Stat. 107 (1949), 77 Stat. 132 (1963), 78 Stat. 748 (1964)].

The provisions of Section 2, Seventh; Section 2, Tenth; Section 5, First; and Section 6 of the Railway Labor Act are set forth herein, verbatim, as follows:

Section 2, Seventh (45 U.S.C. 152, Seventh):

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 2, Tenth (45 U.S.C. 152, Tenth):

"Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided,* That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

Section 5, First (45 U.S.C. 155, First):

"First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

Section 6 (45 U.S.C. 156):

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197."

2. The Norris-La Guardia Act, as amended, 29 U.S.C. 101-115 [47 Stat. 70 (1932), 62 Stat. 862 (1948)]. Section 8 of the Norris-La Guardia Act, 29 U.S.C. 108, 47 Stat. 72 (1932), is set forth herein as follows:

"§ 108. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who

has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

QUESTIONS PRESENTED

1. May a Federal District Court aid a carrier faced with a legal strike, by relieving the carrier from its duty to comply fully with the Railway Labor Act in order to effectuate the carrier's "right to continue to run its railroad under the strike conditions"?

2. Did not the Court of Appeals rule in conflict with a decision of this Court, *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.* (1944), 321 U.S. 50, by holding that affirmative federal equitable relief may be granted to a railroad involved in a legal strike even though the railroad has repeatedly rejected voluntary arbitration of the strike issues?

STATEMENT OF THE CASE

Present Litigation

The United States brought this suit in April, 1964, in the United States District Court for the Middle District of Florida, Jacksonville Division, against the Florida East Coast Railway Company[1] to enforce the "status quo" provisions of Section 2, Seventh, and Section 6 of the Railway Labor Act (R. 2-11).[2] The

[1] Hereinafter referred to as FEC.

[2] The printed record in this case consists of three volumes. Volumes I and II contain the pleadings, court orders, and a transcript of the testimony. The third volume, entitled "Exhibit Volume", contains most of the documentary evidence introduced at the hearings, certain excluded exhibits designated for inclusion by the FEC, and the exhibits attached to the Affidavit of Eugene C. Thompson, Executive Secretary of the National Mediation Board,

three-count complaint sought injunctive relief to prohibit the FEC from continuing in effect or implementing (1) a Section 6 Notice of July 31, 1963 (i.e., a notice required under § 6 of the Railway Labor Act), served by the FEC upon eighteen labor organizations proposing to abolish the union shop provisions in its contracts with those organizations; (2) a Section 6 Notice of September 24, 1963, served by the FEC upon seventeen labor organizations proposing a complete revision of all existing rules, rates of pay, and working conditions; and (3) certain "Conditions of Employment" which were also a complete revision of all contracts substantially the same as the September 24, 1963, Section 6 Notice proposal, and which the FEC had promulgated in written form on September 1, 1963, and had put into effect and implemented without serving any Section 6 Notice whatsoever.

The complaint alleged that the two Section 6 Notices had been put into effect while the National Mediation Board[3] had them docketed for mediation and before

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which the trial Court stated without objection would be considered by the Court and, to avoid duplication in the record should not be reintroduced into evidence (R. 278). Volumes I and II are paginated consecutively whereas the Exhibit Volume is paginated independently. References to Volumes I and II will be made by the smbol "R.", e.g., "R. 25"; references to the Exhibit Volume will be made as follows: "Exh. Vol., p. 25." The only significant documents which do not appear in the Exhibit Volume are the many voluminous contracts between the FEC and the non-operating unions (Pl.'s Exh. 4, R. 285), which were already in printed form and were not, by agreement of all parties, reprinted for the Court of Appeals, but, instead, several printed copies of one of the contracts, the Shop Crafts Agreement (Pl. Exh. 4-C, R. 333-334), were supplied to the Court of Appeals as a part of the record. Fourteen copies of this printed Shop Crafts Agreement, plus fourteen copies of three other contracts, have also been supplied to the Clerk of this Court.

[3] Hereinafter referred to as NMB.

the NMB had finally acted upon them under Section 5, First, of the Railway Labor Act, and that the "Conditions of Employment" had been implemented without following any of the procedures required by the Railway Labor Act. The complaint was accompanied by a motion for preliminary injunction (R. 13-16), and an affidavit of the Executive Secretary of the NMB (R. 37-42).

On May 6, 1964, eleven of the eighteen labor organizations referred to in the complaint moved to intervene as additional plaintiffs (R. 43-44). The movants were the eleven so-called "non-operating"[4] unions which had gone on strike against the FEC on January 23, 1963, and are the petitioners in Case No. 750 in this Court.

On May 26, 1964, the FEC filed its answer to the complaint (R. 96-107) admitting many of the factual allegations of the Government's complaint. The case came on for hearing (R. 235) before Chief Judge Bryan Simpson on the Government's motion for a preliminary injunction, the eleven non-operating unions'

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[4] In the parlance of the railroad industry, "operating" unions are unions representing crafts which actually operate trains (e.g., engineers, conductors, trainmen, brakemen, firemen, switchmen, hostlers, and yardmen) while "non-operating" unions represent other crafts involved in the railroad business (e.g., clerks, maintenance-of-way employees, signalmen, telegraphers, machinists, etc.). Since dissolution of Eugene V. Debs' American Railway Union after the Pullman strike of 1894, the railroad industry has been overwhelmingly organized along "craft" rather than "industrial" lines. The exceptions to this pattern usually involve only small railroads owned and operated by industries, such as the steel industry, which are organized on an industrial basis. The FEC's Section 6 Notice of September 24, 1963, and its "Conditions of Employment" virtually abolish all craft lines.

petition to intervene, and various FEC defensive motions [e.g., motion to dismiss, (R. 108); motion to stay, (R. 50); motion to continue, (R. 56)]. The petition to intervene was granted at the outset after argument (R. 243); the motions to stay and to continue were denied (R. 244-249); and the motion to dismiss was carried with the case (R. 267-269).

For three days (May 26-May 28, 1964) the District Court received testimony and evidence on the motion for a preliminary injunction (R. 275-592). At the conclusion of the hearing the Court announced it would delay ruling for a reasonably short time to see if the Court of Appeals might render its decision soon in a pending companion case (*Florida East Coast Ry. Co.* v. *Brotherhood of Railroad Trainmen,* 336 F. 2d 172, cert. den., 379 U.S. 990)[5] involving many of the same issues (R. 588-589).

The Court of Appeals ruled in the *Trainmen's* case on August 18, 1964.[6] Thereafter, upon receiving supplemental memoranda from the parties (R. 141, 151), the District Court on October 30, 1964, rendered its Findings of Fact and Conclusions of Law (R. 180-189) and its Preliminary Injunction (R. 189-191) in this case. The relief granted was substantially as sought in the complaint except that the FEC, pursuant to the *Trainmen's* decision, was granted permission to apply to the Court for specific authorization to make changes in rules, rates of pay, and working

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[5] Hereinafter referred to as the *Trainmen's* case.

[6] The Opinion in the Trainmen's case is reproduced in Appendix C to the Government's petition for certiorari in No. 782, pp. 26a-44a.

conditions without following Railway Labor Act procedures during the pendency of the current strike upon a finding by the Court of a "reasonable necessity therefor" (R. 190-191, par. (e)).

On November 12, 1964 (before the injunction took effect), an Application of Defendant [FEC] for Approval of Employment Practices was filed (R. 216) supported by affidavits (R. 195, 203, 211) claiming that the effect of the injunction, if no deviations were permitted, would be to reduce the FEC's business by from 30% to 50% (R. 196, 206, 214) and possibly "to stop the operation of the railroad immediately and completely" (R. 206). The District Court continued a stay of its injunction until hearing on the application (R. 222-223). The hearing came on November 30, 1964 (R. 593) and continued for three days (R. 593-898). The FEC's Application was opposed by both the United States and Intervenors (R. 868-878, 879-882).

On December 3, 1964, an Order was entered granting portions of the FEC's application and denying others (R. 223-225).[7] Both the FEC and the United States appealed from the preliminary injunction and the Order of December 3, 1964 (R. 225, 234).

On appeal all parties made a frontal assault on the ruling in the *Trainmen's* decision. The FEC renewed its contention that its operations during the non-operating unions' strike were exempt from the pro-

[7] The time limits in the Order of December 3, 1964, have since been extended by the District Court and all of the exceptions granted are still in effect.

hibitions of the Railway Labor Act[8] and that the District Court was without jurisdiction to enforce the Act. The United States and Intervenors argued that the so-called "reasonably necessary" exceptions doctrine enunciated in the *Trainmen's* decision should be reconsidered and receded from as contrary to both the language and the policy of the Railway Labor Act. The United States also reasserted (R. 869) that the FEC was barred by the doctrine of unclean hands from seeking the affirmative equitable relief involved in the "reasonably necessary" exceptions doctrine, and Intervenors urged that the FEC, having repeatedly declined voluntary arbitration, was barred from seeking affirmative equitable relief under the decision of this Court in *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S. 50 (1944).

On July 21, 1965, the Court of Appeals rendered its decision affirming the injunction and the Order of December 3, 1964, in all respects and declining to modify its earlier ruling in the *Trainmen's* case (R. 903-911). These petitions for a writ of certiorari followed and were granted on January 24, 1966 (R. 915).

Statement of Facts

The background leading up to this case is extensively set forth in the Report to the President by Emergency Board No. 157 (Exh. 17 to Affidavit of Eugene C.

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[8] This argument is sometimes loosely referred to as the "*contract* suspension" argument. Actually, and more accurately, it is a "*statute* suspension" argument since it is the statute, more than the mere contracts, which requires carriers by rail to preserve existing rules, rates of pay, and working conditions unless changed in accordance with the statute's prescribed procedures. *Manning* v. *American Airlines*, 329 F. 2d 32 (2 Cir. 1964), cert. den., 379 U.S. 817.

Thompson, Exh. Vol., pp. 451-506; R. 278). Briefly summarized, the dispute began on September 1, 1961, with the Intervenors serving a Section 6 Notice on the FEC and all other Class I railroads seeking a 25¢ per hour across the board pay raise (R. 456) and six months' advance notice of any reduction in force or abolition of a position (R. 495-497). To this the carriers responded with a counter-proposal reducing rates of pay by 20% and eliminating all rules requiring more than twenty-four hours' notice of any reduction in force or abolishment of a position (R. 498-500).

The dispute was negotiated on a national basis[9] until the FEC on February 9, 1962, withdrew from the Southeastern Carriers Conference and announced that it would not be bound by any settlement reached on a national basis (Exh. Vol., p. 456; R. 844). Shortly thereafter the national bargaining was settled in con-

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[9] It has been customary in the railroad industry for collective bargaining to be conducted on a national basis, i.e., with the carriers and the organizations bargaining through national or regional conferences or committees and reaching uniform agreements applying to all. The reasons for this pattern of bargaining are well set forth in the Report to the President by Emergency Board No. 157 (Exh. Vol., pp. 471-472). Basically, as stated by a carrier spokesman, they involve "the extraordinary degree to which railway employees from different carriers * * * are thrown together in their work, * * *" and "* * * the fact that employee morale and stable and harmonious labor relations can be maintained, and endless turmoil and strife avoided, only if uniform and nondiscriminatory adjustments are made in the rates of pay and in the rules governing the compensation and working conditions of all classes and crafts of employees * * *" (Exh. Vol., pp. 471 and 472). Both the carriers and the organizations have traditionally advocated national handling (Exh. Vol., p. 471), albeit after passage of Public Law 88-108 in 1963 imposing compulsory arbitration on a national level for the first time during peace in this Nation's history, many of the labor organizations are reconsidering their position in this regard.

formity with the recommendations of Emergency Board No. 145 on the basis of a 10.28¢ per hour across the board wage increase and a five working day notice requirement for abolishing jobs (Exh. Vol., pp. 455-456). This soon left the FEC as the only Class I railroad in the country which did not accept the recommendations of Emergency Board No. 145 (Exh. Vol., p. 456).

Meanwhile, bargaining with the FEC proceeded to a stalemate (Exh. Vol., pp. 457-458); both sides rejected arbitration as proffered by the NMB (Exh. Vol., p. 457); and on January 23, 1963, the non-operating employees represented by Petitioners struck (Exh. Vol., p. 458).

The FEC ceased operations due to the strike from January 23 to February 5, 1963, when it operated its first post-strike train from Jacksonville to Miami (R. 394-396). Thereafter, the FEC gradually recruited a work force (Def.'s Exh. II, Exh. Vol., pp. 219-220; Def.'s Exh. BB, Exh. Vol., pp. 167-168; R. 718, 657) until by May, 1964, the FEC had working approximately fifty percent of its pre-strike force, in terms of numbers (R. 381), and was handling approximately 95% of its pre-strike carload freight capacity (R. 361, 363, 371, 379-380, 386), albeit it was not handling less-than-carload freight (R. 380, 397) or any passenger service (R. 802, 353, 367, 755-757; Exh. 17, Exh. Vol., pp. 459-460).[10]

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[10] The FEC did not restore any passenger service until after the Florida Public Utilities Commission's original order requiring it to do so was quashed by the Florida Supreme Court and a more restricted PUC order entered. See *Florida East Coast Ry. Co.* v. *Mason*, Fla., July 14, 1965, 177 So. 2d 217.

Meanwhile, continuing Government efforts to bring about a settlement of the dispute were unsuccessful. Requests that the parties agree to voluntary arbitration were renewed by the Secretary of Labor in April and May of 1963 (Exh. Vol., p. 459). This time the striking unions accepted the requests, but the FEC refused both times (Exh. 17 to Thompson Affidavit, Exh. Vol., p. 459; R. 278).

Due to the fact that the FEC, under contract with N.A.S.A., was constructing a spur which would be the sole railroad link into the complex of defense and space program installations on Cape Kennedy (then Cape Canaveral) and Merritt Island (Exh. Vol., pp. 454, 459-462, 491), the Government's concern about the dispute grew sharper. In September 1963, President Kennedy ordered a special Federal Inquiry Board to investigate the dispute (Exh. Vol., pp. 501, 460). The Board found the dispute to be "currently and potentially detrimental to our Nation's defense and space efforts" (Exh. Vol., p. 460), and recommended resumption of negotiations and voluntary arbitration (Exh. Vol., p. 460). President Kennedy, on receipt of the report, reiterated his concern, asked the NMB to renew its efforts, and requested to be kept advised (Exh. Vol., p. 504). The NMB's further mediation efforts were not successful, and again the NMB proffered arbitration (Exh. 17 to Thompson Affidavit, Exh. Vol., p. 461; R. 278). Again the unions accepted (Exh. Vol., p. 461). Again the FEC rejected the proffer (Exh. Vol., p. 461).

One of the last official acts of President Kennedy was the creation of Emergency Board No. 157 by Executive Order No. 11127 (Exh. Vol., pp. 491-492).

The Board convened on November 20, 1963, recessed on November 23 for ten days in mourning for the death of President Kennedy, and filed its report with President Johnson on December 23, 1963 (Exh. Vol., pp. 451-490). The unions have agreed and do now agree to accept the report's recommended basis for settlement; the FEC refuses.

Meanwhile, as described above, the FEC was expanding its work force and resuming the most profitable phase of its business, carload freight. In doing so, however, it did not work the employees in either the striking crafts or the non-striking crafts[11] according to the rules, rates of pay, or working conditions as embodied in their existing contracts, but instead, as admitted in FEC's answer (R. 102-103), used "the manpower available to it in whatever manner required to provide service to the public." These radically different rules, rates of pay, and working conditions were finally codified by the FEC on September 1, 1963, under the title "Conditions of Employment" (Pl.'s Exh. 2, Exh. Vol., pp. 4-35; R. 276-277), and each employee was required to sign a receipt for such Conditions agreeing individually "to work thereunder." (Pl.'s Exh. 4A, Exh. Vol., p. 75; R. 283-284). It is clear that the Conditions of Employment were the exclusive rates of pay, rules and working conditions for the people showing up for work, both prior to September 1, 1963, and thereafter, until the FEC put into effect certain Section 6 Notices

[11] The employees in the non-striking crafts mostly honored the strikers' picket lines. However, this was not 100% the case, as admitted by FEC in its answer (R. 102, par. 8). The non-striking unions left this decision up to the individual worker (e.g., R. 487, 484-488).

hereafter discussed (R. 289-302, 342-343, 289-351). It is also clear that the Conditions of Employment are different from the various existing contracts (R. 103, 289-290, 327, 331, 334, 335); that the contracts themselves make no provision for such "emergency" measures (R. 324); and that under the Conditions of Employment craft lines were abolished (Pl.'s Exh. 2, Exh. Vol., p. 5; R. 276-277), seniority rights changed (R. 327, 331), safety provisions eliminated (R. 334), pay rates altered (R. 335), and a 6-day week instituted when deemed needed by the railroad (Pl.'s Exh. 2, Exh. Vol., p. 19; R. 276-277).

After putting the Conditions of Employment in written form on September 1, 1963, the FEC next incorporated almost all of their provisions into a Section 6 Notice dated September 24, 1963, which it served upon the seventeen non-operating crafts (R. 320; Exh. 12 to Thompson Affidavit, Exh. Vol., pp. 399-440; R. 278). This September 24, 1963, Section 6 Notice, also called "The Uniform Working Agreement" (Exh. Vol., pp. 402, 38), is "fundamentally the same" (R. 343) although not identical with the prior Conditions of Employment (R. 312-317). And on September 25, 1963, a similar Section 6 Notice was served by the FEC on the operating crafts (Pl.'s Exh. 3, Exh. Vol., pp. 36-74; R. 281-282). In sum, the Uniform Working Agreement proposed under Section 6 to the operating crafts on September 25, 1963; the Uniform Working Agreement proposed under Section 6 to the non-operating crafts on September 24, 1963; and the Conditions of Employment previously put into operation by the carrier as to all crafts after the strike and reduced to writing on September 1, 1963, are all substantively and in form

about the same (R. 319; compare Pl.'s Exh. 2, Exh. Vol., pp. 4-35; R. 276-277 with Pl.'s Exh. 3, Exh. Vol., pp. 36-74; R. 281-282 and with Exh. 17 to Thompson Affidavit, Exh. Vol., pp. 399-440; R. 278).

In regard to the non-operating crafts, the carrier proposed an initial conference on its September 24, 1963, Section 6 Notice for October 18, 1963 (Exh. Vol., p. 400). The parties all met on October 18, but the conference broke up over a dispute concerning the FEC's insistence that the bargaining session be transcribed verbatim by a court reporter (Exh. Vol., pp. 400, 444-446).[12] Within ten days thereafter, the unions invoked the mediation services of the NMB by letter dated October 23 (Exh. 12 to Thompson Affidavit, Exh. Vol., pp. 399-402; R. 278) and by telegram on October 25, 1963 (Exh. 10 to Thompson Affidavit, Exh. Vol., p. 397; R. 278). The NMB in turn notified the FEC by telegram on October 25, 1963, that the unions had invoked mediation and cautioned the FEC about the provisions of Section 6 of the Railway Labor Act (Exh. 11 to Thompson Affidavit, Exh. Vol., p. 398). Nevertheless, the FEC on October 28, 1963, replied to the NMB that it was going to place its September 24, 1963, Section 6 Notice into effect anyway because the unions had terminated the prior conference over the presence of the court reporter and had thereby lost their right "to avail themselves of services of the

[12] In this regard, it should be noted that the NMB in mediation sessions has usually followed a practice of banning verbatim transcripts as too formal for effective bargaining on a give and take basis. See R. 531, 561-562. When the FEC insisted on recording a mediation session, over the protest of the mediators, the mediators likewise withdrew from the meeting (R. 521-522).

Mediation Board" (Exh. 13 to Thompson Affidavit, Exh. Vol., pp. 440-441). Two days later, on October 30, 1963, the FEC formally placed its Section 6 Notice of September 24, 1963, into effect as to sixteen crafts (Exh. 14 to Thompson Affidavit, Exh. Vol., pp. 442-446; R. 278).[13] The next day, October 31, 1963, the NMB again advised the FEC by telegram that it had assumed jurisdiction of the case and that Section 6 of the Railway Labor Act applied (Exh. 15 to Thompson Affidavit, Exh. Vol., pp. 446-447). The FEC continued undeterred on its course of action (R. 97-98, 286, 318) and maintained its Section 6 Notice of September 24, 1963, in effect from October 30, 1963, until enjoined in this case (R. 318).[14]

A similar history in all respects occurred in regard to the other Section 6 Notice here involved which was served by the FEC on July 31, 1963, upon those unions which had union shop provisions in their contracts, proposing to cancel such agreements (Exh. 1 to Thompson Affidavit, Exh. Vol., pp. 376-379). The initial conference held on August 29, 1963, aborted over the court reporter issue and a timely request for NMB mediation was made by the unions (Pl.'s Exh. 1,

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[13] One of the 17 crafts served with the Notice, the International Association of Railway Employees, proceeded to meet with the FEC after the October 18th conference aborted and did not join in the other unions' request for its services to the NMB (Exh. 16 to Thompson Affidavit, Exh. Vol., pp. 448-449; R. 278; R. 97, par. 6).

[14] Without detailing the facts it is sufficient to say that substantially the same events occurred in regard to the September 25, 1963, Section 6 Notice proposing the Uniform Working Agreement to the operating crafts, and the FEC implemented it as to all such crafts except the Trainmen (who continued to meet despite the court reporter) on November 4, 1963, over the protest of the NMB and the unions. (R. 281-282, 287-318, 296-297, 344-349; Pl.'s Exhs. 7 and 8, Exh. Vol., pp. 81-84; R. 305, 310.)

Exh. Vol., pp. 1-3; R. 261-263). The NMB advised the FEC of this fact on September 9, 1963 (Exh. 6 to Thompson Affidavit, Exh. Vol., p. 389), but the FEC wrote back that it had cancelled the agreements on September 9, 1963, and would continue to treat them as cancelled (Exh. 7 to Thompson Affidavit, Exh. Vol., pp. 390-393). The NMB formally protested this FEC action (Exh. 8 to Thompson Affidavit, Exh. Vol., pp. 394-395) but the FEC in response merely reiterated its position (Exh. 9 to Thompson Affidavit, Exh. Vol., pp. 395-396).

Summary

In summary, the evidence showed conclusively that the FEC, since resuming operations in February, 1963, had completely ignored all the requirements of the Railway Labor Act in regard to maintaining or changing rules, rates of pay, and working conditions both as to those crafts on strike and those not on strike. The FEC stated candidly that if enjoined in this case from keeping its Section 6 Notices of July 31, 1963, and September 24, 1963, in effect, it would then "revert" to the Conditions of Employment (R. 325, 311) which are merely the same thing by a different name.

In regard to the effect of applying the Railway Labor Act provisions to its operations under strike conditions, the FEC's chief witness (its vice-president in charge of personnel, R. W. Wyckoff, R. 275-276) conceded that the Act's restrictions would not have prevented the railroad from operating entirely, but would have severely curtailed its operations (R. 330):

> "Q. But you could have operated on a reduced basis, I take it, if you tried to comply?

"A. Mr. Shapiro, we certainly have an obligation to perform to the greatest degree possible the service which the public needs require and is entitled to receive.

"Q. You didn't answer my question.

"A. I thought I did.

"Q. The question was: You could have operated on a reduced basis if you had complied, could you not?

"A. It would have been a very reduced basis and it would not have been fulfilling our obligation to the public.

"Q. But you could have operated?

"A. On a very restricted basis, yes."

The effect of applying the Railway Labor Act's provisions, undiluted, on the railroad's present operations was variously estimated by FEC witnesses as requiring a 30% to 50% reduction in its current volume of business (R. 196, 206, 214, 219, 381, 367, 354, 771, 863). While the FEC has, and has had since October, 1963 (R. 361-367), sufficient manpower to operate at 95% of capacity under the Conditions of Employment and the September 24, 1963, Uniform Working Agreement (R. 312), it lacks sufficient numbers of skilled and experienced craftsmen so as to work its personnel "as required by the agreements" (R. 214), and therefore finds it an "enormous saving" to cross craft lines (R. 682, 207-208, 213), to use supervisors for scope work (R. 399, 567, 740, 754), to contract out (R. 215), to ignore apprentice ratios (R. 208, 211-214), etc. The FEC has had little success in recruiting experienced employees from other railroads (R. 713-714) and finds the task of training its replacement

force a lengthy and difficult one (R. 197-202, 370-371, 625-626, 661, 714, 739). The task is complicated by "a good bit of turn-over" (R. 685).

Obviously, and as admitted by the FEC's President, undiluted compliance with the provisions of the Railway Labor Act will substantially "affect the ability of the Railroad to withstand this strike" (R. 762).

Companion Litigation

A. Federal Labor Injunctions Obtained by the FEC

Since the Court of Appeals for the Fifth Circuit has enunciated the "reasonably necessary" exception to the Railway Labor Act in this dispute for the first time in the Act's 40-year history, and since the purpose in so doing as expressed by that Court in the *Trainmen's* case is to accommodate the law so as to make "effectual" the railroad's "right to operate" (336 F. 2d at 181), it is relevant to know what other accommodations have been made by federal courts in this dispute concerning management's "right to operate" and labor's "cherished right to strike" (336 F. 2d at 181).

The FEC's main line runs, generally speaking, from Jacksonville to Miami (Exh. 17 to Thompson Affidavit, Exh. Vol., pp. 453-454). On the north end, through the Jacksonville Terminal Company (which is owned, operated and controlled by the FEC together with the other railroads),[15] the FEC connects with four other railroads; on the south end it connects with the Broward County Port Authority Belt Line Railroad

[15] See *Florida East Coast Ry. Co.* v. *Jacksonville Terminal Co.*, 328 F. 2d 720 (5 Cir., 1964).

which services Port Everglades, the largest deep water port in South Florida, situated just a few miles north of Miami. Within 4½ months after the strike began on January 23, 1963, the FEC obtained two federal court injunctions which completely destroyed the efficacy of any lawful, peaceful picketing at these key interchange points. In neither case was there any charge of improper, unruly or violent picketing; in neither case were the striking unions made parties or given advance notice of the proceedings. The injunctions were issued, insofar as the unions were concerned, ex parte. In both cases the injunctions were entered in suits brought by the FEC against its connecting carriers *only* and the injunctions obtained compelled the carriers "and their officers, agents, servants, *and employees*" (emphasis added) to accord the FEC full interchange and switching services. The effect of the injunctions was to require the connecting carriers' employees to cross the FEC's employees' picket lines or to perform car service and all other services for the FEC on the Terminal Company premises. In Miami, the unions learned about the injunction when it was served upon the employees; in Jacksonville the injunction was posted at the Terminal Company employee bulletin board.

The injunction in Jacksonville was entered on January 30, 1963, by Judge McRae in Case No. 63-16-Civil, *Florida East Coast Railway Company* v. *Jacksonville Terminal Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company, Southern Railway Company, and Georgia Southern and Florida Railway Company.* The injunction in Miami was entered on June 5, 1963, by Chief Judge Dyer in Case No. 63-282-Civil, *Florida East Coast Railway Company* v. *Broward County Port Authority.*

In Miami the unions were permitted to intervene in the proceedings; a motion to dissolve the injunction based upon the Norris-La Guardia Act and this Court's decision in *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S. 50 (1944), was denied; and some two years later the injunction was reversed for lack of jurisdiction in *Brotherhood of Locomotive Firemen and Enginemen* v. *Florida East Coast Railway Co.*, 346 F. 2d 673 (5 Cir., June 8, 1965). The injunction was not formally lifted until July 30, 1965. Although the suit in Jacksonville has still not proceeded beyond the preliminary injunction stage, and no final hearing has yet been held or even scheduled, the unions' petition to intervene in that case, made after the Court of Appeals' decision in the Miami case, has been denied and is on appeal. A declaratory judgment suit to construe the injunction and its legal effect if any upon the unions and employees is also pending before the District Court.

While ruinous in their effect on the strike both injunctions have been obeyed and honored in all respects. No charge of violation has ever been made.

Thus blocked from anything more than token picketing at the FEC's two main interchange points, two of the striking unions, the Order of Railroad Telegraphers (now Transportation-Communication Employees Union) and the Brotherhood of Maintenance of Way Employes, commenced very limited picketing at the Cape Kennedy spur of the FEC, on which FEC traffic, according to its President, "has increased tremendously and * * * [is] going to increase substantially" (R. 393). Pickets were established for two days in September, 1963, and resumed for two days in February, 1964, and for two days again in June, 1964. On the latter two occasions, the National Labor Re-

lations Board obtained temporary injunctions restraining the picketing under Section 10(l) of the National Labor Relations Act, 61 Stat. 146, 73 Stat. 544, 29 U.S.C. 160(l), on the basis that the Maintenance of Way Employes and Telegraphers' unions, which represent only employees in the railroad industry, were guilty of an unfair labor practice under the National Labor Relations Act as agents for all the other striking FEC unions. The NLRB subsequently adopted this view in ruling on the merits of the charge (Member Jenkins dissenting), 150 NLRB No. 37; the Court of Appeals for the District of Columbia affirmed per curiam (Chief Judge Bazelon dissenting), 350 F. 2d 791; and the case is currently pending in this Court on petition for certiorari filed January 17, 1966 (Case No. 918, October Term, 1965, *International Brotherhood of Electrical Workers, AFL-CIO, et al.*, v. *NLRB*).

In summary, peaceful picketing during the first 2½ years of this strike has been effectively enjoined and restrained by federal court orders at the three principal places on the FEC's system where it could be expected to have any economic effect sufficient to induce the carrier to make any efforts to settle the controversy.

B. Other Litigation

Since the strike began in early 1963, the FEC repeatedly has been found in violation not only of federal statutes, but of specific injunctions against it enforcing those statutes. These violations were brought to the attention of the trial court (R. 869) and in many cases were known to the Court from its own experience in companion cases.

In *United States* v. *Florida East Coast Ry. Co.*, (D.D.C., May 7, 1963), 221 F. Supp. 325, the FEC was

found in violation of Section 10 of the Railway Labor Act and enjoined to comply with its status quo requirements. Actually, as shown by the evidence in this case, its ad hoc operations continued unchanged and unaffected by the injunction.

In *United States* v. *Florida East Coast Ry. Co.* (M.D,. Fla., nunc pro tunc to date or oral ruling, December 12, 1963), 55 LRRM 2798, the FEC was found in violation of the status quo requirements of P.L. 88-108, 77 Stat. 132.[16] Actually, as shown by the evidence in this case, its operations under the Conditions of Employment continued unchanged and without variation despite the injunction (R. 296-297, 869).[17]

In the *Trainmen's* case the original injunction of March 2, 1964 (55 LRRM 2561) was stayed by the Court of Appeals two weeks later, and the modified injunction entered after receipt of the mandate after the Court of Appeals' decison of August 18, 1964, became effective October 9, 1964. Thereafter the FEC was found by Chief Judge Simpson on two separate occasions, December 7, 1964, and February 12, 1965,

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[16] P.L. 88-108 also appears in the current pocket supplement to 45 U.S.C.A. 157.

[17] At the trial in that case in December, 1963, the FEC's chief personnel officer had testified to the Court that if enjoined, "We would revert to the last duly negotiated rules, which were those in effect prior to November the 4th [1963]" (R. 300). The witness did not advise the Court or say anything about the Conditions of Employment promulgated unilaterally on September 1, 1963, and, in fact, the railroad did not revert to any "duly negotiated rules" after the Court's oral injunction (R. 296-303). FEC's counsel's assertion that he told the Department of Justice's attorney about the "Conditions of Employment" at that time (R. 297) was directly refuted by the Government attorney who tried both cases (R. 560).

after full scale hearings, to be in "deliberate and willful" violation of the injunction and in contempt of court. Civil Case 64-40-Civil-J, M.D. Fla., *Brotherhood of Railroad Trainmen* v. *Florida East Coast Ry. Co.*

In November, 1964, the FEC was again found to be in violation of the Railway Labor Act and enjoined therefrom in *Brotherhood of Locomotive Engineers* v. *Florida East Coast Ry. Co.* (M.D. Fla. 1964), 57 LRRM 2641, stay denied, 341 F. 2d 99, 58 LRRM 2283. On September 24, 1965, the FEC was found in civil contempt of this injunction, 60 LRRM 2292.

Likewise, FEC violation of the Act was enjoined on January 6, 1965, in Case No. 64-237-Civil-J, M.D. Fla., *Order of Railroad Conductors* v. *Florida East Coast Ry. Co.,* and a contempt order in this case was only recently entered against the FEC an February 28, 1966.

Finally, in *Florida East Coast Ry. Co.* v. *Gamser,* M.D., Fla. 1965, Case No. 65-165-Civil-J, the FEC's application for injunctive relief against the NMB was denied on May 28, 1965, on the specific finding that the FEC had failed to approach the mediation conference table in good faith.

C. Summary

In summary, the role of the federal courts in this dispute, the longest railroad strike in the Nation's history, can hardly be described as a retiring one. An observer may wonder, however, whether any of this multitudinous litigation would have resulted, or been necessary, had the first injunction of January 30, 1963, against picketing at the FEC's key northern link with the rest of the nation not been rendered. As pointed

out by the railroad's President, "the Railroad is completely isolated" if that link is broken (R. 790). Even semi-isolation caused by legitimate, peaceful picketing at the Jacksonville Terminal might have effected a change in the FEC's attitude toward good faith mediation or voluntary arbitration.

SUMMARY OF ARGUMENT

The Railroad's contention that during a strike the provisions of the Railway Labor Act are suspended, and the Court of Appeals' ruling that during a strike a federal court may create judicial exceptions to the Railway Labor Act, are contrary to the plain language and the underlying policy of the Act. They have no support in the statute's legislative history. Neither deviation from the literal language of the Act should be judicially created. Both doctrines undercut fundamental policies of the Railway Labor Act: (1) compulsory mediation; (2) voluntary arbitration; and (3) preservation of the status quo so as to confine existing disputes within their original limits and prevent them from escalating into irreversible conflagrations.

Analogies loosely drawn from National Labor Relations Act cases are as apt to mislead as they are to guide. The policies and scheme of the two federal labor statutes are different. Congress has ample justification for legislating in a different way for the railroad industry from the way it legislates for other businesses affecting interstate commerce generally.

In any event, the decisions under the NLRA do not support the exceptions here claimed and defended.

Courts should not substitute their views as to a proper adjustment of the economic balance of power

for those adopted by Congress, especially in an area directly involving the public interest and national defense.

If judicial exceptions to the Railway Labor Act are to be created, they should be limited rather than broad in nature. Therefore, the Court of Appeals' "reasonably necessary" exceptions doctrine is sounder than the "statute suspension" contention urged by the Railroad.

If the "reasonably necessary" exceptions doctrine of the Court of Appeals is to be followed, it should be harmonized with the policies of the Railway Labor Act and the Norris-La Guardia Act. The affirmative equitable relief and benefits of such doctrine should not be available to a party that has rejected voluntary arbitration and has flouted the procedures of the Railway Labor Act.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE RAILWAY LABOR ACT FORBIDS EITHER SUSPENSION OF THE STATUTE DURING A STRIKE OR JUDICIALLY-CREATED EXCEPTIONS TO THE STATUTE DURING A STRIKE.

The language of the Railway Labor Act is plain and unmistakeable:

> "Section 2, Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of the Act." 45 U.S.C. 152, Seventh.

The willful failure or refusal to comply with this provision is a federal crime. 45 U.S.C. 152, Tenth.

Here, as stated by the Court of Appeals in the *Trainmen's* decision, 336 F. 2d at 179, a railroad has

instituted wholesale changes "with no pretense at compliance with the Act." The action of the FEC flies squarely in the teeth of the statute. It is suggested that the reason the questions here presented are first arising some forty years after the statute's enactment is that no other carrier has had the termerity to act in such bold contravention of a federal law. The evasive rationalization for such action by the FEC's Vice President and Director of Personnel in this case (R. 287-351), and his misleading if not blatantly false testimony in the earlier case brought by the United States in December, 1963 (R. 296-302, 560), further suggests that the course of action undertaken by the FEC was not the product of naivete, but a deliberate undertaking in violation of clear statutory language. Due respect for law and order would command that a party embarking on such a course of action, at the very minimum, not conceal its nature when questioned about its conduct in a federal court by the United States. But despite extensive questioning by the United States' attorney in December, 1963, on the subject of the FEC's then current practices, not so much as a single reference was made by any FEC witness to its formally promulgated "Conditions of Employment" which were at that very time in effect for the craft of trainmen and which had been the rules in effect for the other operating crafts prior to November 4, 1963 (R. 296-302, 560). Instead the FEC's witness testified under oath as follows (R. 300):

> "Q. And am I correct, Mr. Wyckoff, that if the rules which were put into effect on November 4, 1963, were to be withdrawn, that the previously existing arrangements would be placed in effect, would govern the employment, would govern the rates of pay, rules and working conditions of the

employees in the crafts or classes who are presently operating your trains;"

"A. We would revert to the last duly negotiated rules, which were those in effect prior to November the 4th."

FEC's lack of candor in regard to its actions taken in violation of the plain language of a federal criminal law is at least indicative that the FEC itself, at one time, thought the plain statutory language meant exactly what it says.

II. LEGISLATIVE HISTORY OF THE RAILWAY LABOR ACT DOES NOT SUPPORT THE STATUTE'S SUSPENSION EITHER IN WHOLE OR IN PART DURING A STRIKE.

Ever since the 1870's Congress has been vitally concerned with the matter of labor disputes in the Nation's railroad industry. Recognizing the dire consequences that the public as well as the parties suffer when labor-management relations break down in this key area of our economy, Congress has repeatedly struggled with the problem of providing a fair method of settling such disputes consistent with freedom and our traditions. Perhaps no other subject has come before the Congress so repeatedly and so persistently over so long a period. Public Law 88-108, approved August 28, 1963, 77 Stat. 132, is a recent example. The first legislation, providing for voluntary arbitration and public investigations, was passed in 1888. 25 Stat. 501. Between those dates, Congress applied its attention to the problem repeatedly—in the Erdman Act of 1898, 30 Stat. 424; the Newlands Act of 1913, 38 Stat. 103; Title III of the Transportation Act of 1920, 41 Stat. 469; and then the Railway Labor Act of 1926, 44 Stat. 577, thereafter amended in 1934, 48 Stat. 1186,

in 1948, 62 Stat. 909, and in 1951, 64 Stat. 1238. Hardly a decade has elapsed without the need for Congressional attention.

With this almost continual Congressional attention to the matter of labor disputes in the railroad industry, the volume of legislative history is understandably immense. Certainly Congress in its repeated concern with the subject was not, ostrich-like, unaware of the fact that strikes do still occur in the industry. Yet in all the litigation arising out of this current dispute, the FEC has failed to discover any legislative history even remotely supporting its theory that Congress intended the Railway Labor Act to be automatically suspended, or subject to fragmentary and temporary judicial repeal, during the existence of a strike. The Court of Appeals referred to none in either its *Trainmen's* opinion or the decision in this case. No other court has ever referred to any. It is respectfully submitted that this significant silence in the legislative history activates the canon of statutory construction applied by this Court in construing Section 3, First, of the Railway Labor Act in *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 34-35 (1957), where the Court said:

> "If the Brotherhood is correct, the Adjustment Board could act only if the union and the carrier were amenable to its doing so. *The language of § 3, First, reads otherwise and should be literally applied in the absence of a clear showing of a contrary or qualified intention of Congress.*" (Emphasis added.)

III. THE BASIC POLICIES AND SCHEME OF THE RAILWAY LABOR ACT ARE DEFEATED BY EITHER ITS SUSPENSION OR JUDICIAL INTERFERENCE WITH ITS OPERATION DURING A STRIKE.

Among the general purposes of the Railway Labor Act, as stated by Congress, is the purpose: "(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions." 45 U.S.C. 151a(4).

The means by which the Act attempts to achieve this purpose are clear. Section 2, First (45 U.S.C. 152), enjoins carriers to exert every reasonable effort to make and maintain agreements concerning working conditions (*not* every effort to free itself on a wholesale basis from all existing agreements as the Conditions of Employment and Section 6 Notices of September 24 and 25, 1963, attempt to do). Carriers must file with the NMB copies of their current contracts, and if no contract exists, a statement must be filed as to what rates of pay, rules, and working conditions have been made effective. § 5, Third (e), 45 U.S.C. 155, Third (e). Existing conditions as embodied in agreements are then stamped by § 2, Seventh, with the imprimatur of law[18] and may not be changed except by following specific and clearly defined procedures. These pro-

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[18] See *Manning* v. *American Airlines*, 329 F. 2d 32 (2 Cir. 1964), cert. den., 379 U.S. 817. As the opinion by Judge Friendly (who had an extensive experience with the Act prior to assuming the Bench) makes clear, it is the law and not the contract which requires that conditions be preserved and maintained. For this reason contracts in the railroad industry seldom even contain a meaningless termination clause, whereas contracts in NLRA industries are almost invariably for a specific term only, and indeed, are legally effective in certain respects only for a comparatively short time. See *Leedom* v. *International Brotherhood of Elec. Wkrs.*, 278 F. 2d 237 (D.C. Cir., 1960).

cedures are set forth plainly in Section 6, 45 U.S.C. 156; Section 5, First, 45 U.S.C. 155; and Section 10, 45 U.S.C. 160. They provide for the parties to spell out their requested changes in a "written notice"; for the parties to meet at least once by themselves in conference; for the NMB then to be notified so it may use its best efforts, by the delicate art of mediation, to bring the parties to agreement; for voluntary arbitration if mediation is unsuccessful; and finally, for a cooling-off period while an impartial public Board appointed by the President studies the dispute and makes a report which will form the basis for focusing the power of public opinion on the merits of the matter.

Underlying all of these procedures is the categorical requirement repeated over and over again in the Act (§ 2, Seventh; § 2, Tenth; § 5, First; § 6; and § 10) that pending exhaustion of these procedures no change shall be made, except by agreement, in the conditions out of which the dispute arose.

The whole thrust of the Act is to confine and refine a dispute to its narrowest dimensions. Preservation of the status quo is indispensable lest mediation and voluntary arbitration become mere paper tools.

On the other hand, the doctrine of statutory suspension urged by the FEC, and its companion doctrine of "reasonably necessary" exceptions to the Act, as adopted by the Court of Appeals, operate in precisely the opposite direction. They serve to expand the dispute. The present case is a clear example. What started out as a simple 25¢ an hour wage claim for 11 crafts got refined down under the Act's procedures to a 10.28¢ wage dispute, but has now been blown up to

such proportions that it literally involves every single rate of pay, rule and working condition as embodied in every single contract on the entire railroad.

Why, if restricting the scope of the dispute before a strike helps to settle it, does expanding the dispute thereafter help to end the strike and terminate the disruption of commerce? How, in any way, does the rule fashioned by the Court of Appeals in this case aid the methods and the procedures of the Act? The judicial gloss engrafted onto the Act by the Court of Appeals throws a monkey wrench into all of the Act's elaborately designed machinery for settling disputes once a single Section 6 proposal, no matter how limited in scope, works its way to the "self-help" stage.

IV. THE NATIONAL LABOR RELATIONS ACT, AND CASES THEREUNDER, ARE INAPPOSITE.

The carrier in its brief below, and the Court of Appeals in its opinions, have referred to the line of employer "self-help" cases decided under the National Labor Relations Act, 29 U.S.C. § 141 et seq., as if those cases buttressed their conclusions to suspend the Railway Labor Act totally or in part during a strike. Petitioners respectfully submit that the major premise of such conclusions is not warranted because the two statutes involved, the NLRA and the Railway Labor Act, are more remarkable for their differences than for their similarity. Both statutes, of course, deal with the general subject of labor-management relations in business subject to federal regulation under the Commerce Clause. Beyond this point the similarity ceases. The two statutes involved entirely different approaches to the subject. Different administrative agencies are set up with different duties and functions to perform.

There is no such thing as "an unfair labor practice" charge under the Railway Labor Act, whereas the great bulk of the NLRB's time and energies are devoted to adjudicating such charges brought against either management or the unions. While the staff and officers of the NLRB work primarily as an enforcement agency, making investigations and policing the conduct of the parties according to what the NLRA makes legal or illegal, no enforcement agency as such exists at all under the Railway Labor Act.

In short, the whole scheme and policy of one Act is irreconcilable and inconsistent with the other. Therefore to apply analogies from cases decided under one Act to cases being decided under the other is at best an inconclusive process. The Railway Labor Act is primarily an instrument of government for the particular and peculiar world of the railroad industry—a world which is like a "state within a state." *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711, 752 (dissenting opinion of Frankfurter, J.). For this reason, even if there were a square holding—a "red cow" case—that during a strike the prohibitions of the NLRA are suspended, and any contracts between the parties disappear, it would be of little value in deciding the issues of this case. Of course, there is no such holding even under the NLRA which does not purport to require that conditions embodied in contracts be maintained without change except under certain limited conditions, i.e., when the specific change desired has been defined and the full procedures of the Act have been exhausted.

For example, the case of *NLRB* v. *MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938), relied upon by the Court of Appeals, did indeed hold that during an

economic strike[19] an employer may continue his plant operations by hiring permanent employees who need not be discharged to make room for returning strikers. But *MacKay Radio* dealt with a situation where no collective bargaining agreement had yet been concluded. In this context this Court simply said:

> "Although § 13 provides 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike', it does not follow that an employer, *guilty of no act denounced by the statute*, has lost the right to protect and continue his business by supplying places left vacant by strikers." 304 U.S. at 345 (Emphasis added).

Obviously the case has no application to this Railway Labor Act situation.

Similarly, another NLRA decision relied upon by the Court of Appeals in formulating its "reasonably necessary" exceptions doctrine is *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963). There, as here, the employer argued his conduct in giving superseniority to striker replacements was saved from illegality by an overriding business necessity. The Court, however, held in *Erie Resistor* that the NLRB could properly conclude that the granting of superseniority to striker replacements would be contrary to the NLRA's specific protection of concerted activities by employees, and expressly rejected the contention that:

> "* * * conduct otherwise unlawful is automatically excused upon a showing that it was motivated by business exigencies." 373 U.S. at 229

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[19] A term which has great significance under the NLRA but is meaningless under the Railway Labor Act.

Nor do this Court's recent cases exploring the limits of employer self-help under the NLRA bolster the carrier's position in this case. For example, in *Local U. No. 721* v. *Needham Pack. Co.*, 376 U.S. 247 (1964), it was held that a unions' strike in breach of an express no-strike clause in a contract did not operate to terminate or "suspend" the contract so as to relieve the Employer from its obligation under the arbitration clause of the contract.

It is true that this Court reaffirmed its *Erie Resistor* statement in *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1965), that determining the legality of an employer's economic measures entails the

> "* * * delicate task * * * of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner." 380 U.S. at 312.

But no question of judicial or administrative balancing arises in the present case, for Congress has already, by its clear language, decided and prescribed the answer to the precise issue here presented. The legality of the unions' economic weapon—a strike—is unchallenged. The legality of the railroad's counter weapon —continuing operations with replacement personnel— is likewise unchallenged. But if the unions resort to a strike, clearly they must conduct it lawfully without force and violence. Similarly, if the railroad chooses to operate it must do so within the limits of the law. This is the balance struck by Congress for the railroad industry.

That Congress is the appropriate branch of Government to make this determination has been made clear repeatedly by this Court in such cases as *NLRB* v.

Insurance Agents Union, 361 U.S. 477 (1960), and *American Ship Building Co.* v. *NLRB,* 380 U.S. 300 (1965). In *American Ship Building* this Court rebuked the NLRB for denying use of the lockout to an employer because of its conviction that use of this deivce would give the employer "too much power", describing such action as

> "... the unauthorized assumption by an agency of *major policy decisions properly made by Congress.*" 380 U.S. at 318 (Emphasis supplied)

Congress has made just such a policy decision in the present case.

In support of its argument in the Court below, premised as it was on an extension of current NLRA cases beyond their holdings, the FEC contended that what is good policy under one Act must likewise apply to the other statute. The FEC hence argued (Appellant's [FEC's] brief to Court of Appeals, pp. 30-31) "that the public interest in interstate commerce by railroad is no greater or less than the public interest in interstate commerce in steel or automobiles." But Congress clearly took a different view when it legislated differently for the railroad industry. Clearly such differentiation on the part of Congress is neither arbitrary, unreasonable, nor beyond its power. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381 (1940).

V. DECISIONS OF COURT OF APPEALS IN THIS CASE AND IN FLORIDA EAST COAST RY. CO. v. BROTHERHOOD OF RAILROAD TRAINMEN, 336 F. 2d 172 (5 Cir. 1964), REPRESENT AN UNWARRANTED SUBSTITUTION OF JUDICIAL FOR LEGISLATIVE VIEWS ON PROPER ADJUSTMENT OF ECONOMIC BALANCE OF POWER IN RAILROAD INDUSTRY.

The carrier has placed great emphasis in the proceedings below on the necessity of avoidance of interruptions to interstate commerce. This is indeed a stated purpose of the Railway Labor Act and one which no one would deny was and is of fundamental importance in creating the national labor policy and in deriving appropriate solutions to the recurrent critical problems in labor management relations.

The policy formulating organ of our Government, with Constitutional responsibility to weigh the conflicting economic balance of interests in formulating basic Federal labor policy is, of course, the Congress. In considering the means to achieve the legislative purposes embodied in Section 1A of the Act, Congress had a broad spectrum of policy choice, ranging from compulsory arbitration to a completely *laissez faire* attitude toward the industry. The chosen vehicle was the Act's scheme of initial bargaining on changes proposed by the carrier and employee representatives, supplemented by periods of mandatory mediation, but without compulsory agreement as to the changes proposed.

Once all mandatory bargaining procedures have been exhausted, and if no agreement has been reached, the parties are free to implement the changes which have been properly proposed and fully and exhaustively bargained over. At this point, as to changes desired by the unions, since they obviously cannot unilaterally impose their desired modifications upon the carrier, resort must of necessity be made to overt

economic pressure in order to achieve their goals, *viz.*, a strike.

The carrier, however, is in a substantially different position. As to changes which have been properly proposed by the carrier and over which bargaining has been carried out under the Act, such changes may be implemented by the carrier unilaterally. As to changes proposed by the unions, the carrier is free not to implement them. In both situations, the conflict is subject to resolution in a contest of economic pressure within the confines of applicable law.

Throughout this litigation, the FEC has taken the position that once this impasse of economic conflict has been reached, the Railway Labor Act ceases to be an applicable statute, no longer limits the conduct of the parties, and continues in this state of suspended animation for the duration of the strike period. Since the Act is inapplicable, continues the carrier's argument, its "status quo" provisions are ineffectual during the period of a strike, and the carrier is free to continue operations in whatever manner it deems necessary, under any rates of pay, rules and working conditions which it desires. The collective bargaining agreements, according to this theory, are suspended for the duration of the dispute.

This "suspension" theory was expressly rejected, and properly so, by the Court of Appeals, Fifth Circuit, in *Florida East Coast Railway Co.* v. *Brotherhood of Railroad Trainmen,* 336 F. 2d 172 (CA 5, 1964), *certiorari denied,* 379 U.S. 990 (1965), in the following manner:

> "It is clear that the suspension argument has no merit. The BRT is still the bargaining repre-

sentative of all the employees in the crafts of trainmen and yardmen whether union members or not. Steele v. L. & N. R.R., 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L. Ed. 173. The employees of FEC are entitled to the benefit of the terms of the agreement, and the FEC may not supersede the agreement by individual contracts, whether consented to by the employees or not. Telegraphers v. Ry. Express Agency, 1944, 321 U.S. 342, 346, 64 S.Ct. 582, 88 L. Ed. 788." 336 F. 2d at 180.

If, as the FEC contends, the Act is inapplicable, may it enter into individual yellow-dog agreements with its employees, as expressly prohibited by Section 2, Fifth, 45 U.S.C. § 152, Fifth, of the Act? What other mandatory provisions are to be deemed "suspended" during a strike? Surely, the Court of Appeals was correct in rejecting any doctrine of suspension urged upon it in the *Trainmen's* case, *supra,* and repeated in the present case. Congress' scheme for the settlement of railway labor disputes should not be "suspended" during the very period when economic conflict over properly processed contract changes rages. Where impasse has been reached as to particular changes, to permit wholesale sweeping changes in all contract provisions, even under the cloak of a temporary "emergency" could only serve to exacerbate and prolong the "emergency" if indeed not convert the "emergency" into a semi-permanent state of affairs as witness the present case.

The Court of Appeals in the *Trainmen's* case, having rejected the "suspension" idea, engaged, however, in a classic example of judicial creation. This Court had stated in *Brotherhood of Locomotive Engineers* v. *B.*

& O. R. Co., 1963, 372 U.S. 284, in considering a rail labor dispute of national scope:

> "* * * What is clear * * * is that both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute." 373 U.S. at 291.

Unquestionably, the parties are left to self-help to resolve the particular dispute. The content, scope, and limitations on this "self-help" in the light of the Railway Labor Act is the question remaining.

The Court of Appeals in the *Trainmen's* case, reasoned in the following manner: (336 F. 2d at 181)

> "Indeed, the unquestioned right to resort to self-help is the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.
>
> * * *
>
> "Since the right surely exists, the law must accommodate itself to the exercise of this power in a way that will make it effectual. Brotherhood of Railroad Trainmen v. Chicago R. & I. R.R., 1957, 353 U.S. 30, 40, 77 S.Ct. 635, 1 L. Ed. 2d 622. Anything less either temporizes with the so far determined policy against compulsory arbitration, or puts the full weight of the law on the side of the employees by making it impossible for the Railroad to carry on save on the terms and conditions imposed by the organized employees who now refuse to perform as agreed.
>
> "* * * when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each. On the side of labor, it is the cherished right to strike.

On management, the right to operate, or at least the right to try to operate.

* * *
* * *

"But this right of self-help is not a license for wholesale abrogation of the agreement. As the term implies, it is help which is reasonably needed to meet the impasse of a railroad desiring to run and unions unwilling to furnish workers * * *.

"Although we do not here decide what changes may be reasonably necessary in light of the strike conditions, we hold that in a situation of this sort, it falls to the lot of the District Judge to pass on *which changes are in fact necessary in order for FEC to continue to operate* * * *.

* * *

"We restate * * * it [FEC] is, however, free to institute and maintain such employment practices, etc., as are, and continue to be, reasonably necessary *to effectuate its right to continue to run its railroad under strike conditions* * * *." 366 F. 2d at 181-182. (Emphasis added.)

Careful analysis of the foregoing opinion reveals that during the course of the reasoning, the carrier's right to self-help becomes a "right to continue to run its railroad under strike conditions" and exceptions must be created in mandatory federal labor legislation in order to effectuate this right of operation. In essence this opinion grants leave to a federal district judge to effectuate the carrier's "right of operation", and, as a necessary corollary thereto, to render ineffectual the workers' "cherished right to strike".

Employees are free to *engage* in a lawful strike, but obviously they have no federal right to such statutory

exceptions as may be "reasonably necessary" in order for them to be *successful* in a strike. By this opinion, however, followed and repeated in the present case and indeed referred to as "the law of the case", 348 F. 2d at 686, a carrier now has a right to such statutory exceptions as are "reasonably necessary" in order, in essence, to break the strike. For if the carrier has a federally protected right "to run * * * under strike conditions", then the whole idea of striking is rendered sterile. What the Fifth Circuit has done in fact is to abolish the union's "cherished right to strike" without supplying compulsory arbitration in its place.

The evils which the Norris-La Guardia Act, 29 U.S.C. § 101 et seq., sought to remedy are here introduced in a new and virulent form. It becomes the duty of the District Judge to allow such changes, although prohibited by the Act, as may be "reasonably necessary" to insure the carrier's continued operations.

No provision of law confers a "right" to a carrier to continue in operation under strike conditions, any more than the union has a "right" to stop the carrier from operating. The union has a right to attempt to halt operations through peaceful and lawful means, and the carrier has a right to *attempt* to continue operations with replacement personnel, through peaceful and lawful means.

To require federal district judges to exempt a carrier from mandatory federal legislation, is to introduce a new and seriously disrupting element into the delicate balance of economic relationships. This "exception" doctrine is neither contemplated by the statutory machinery nurtured and created over a long span

of time, nor does it claim any basis in the voluminous legislative history of the Act.

The doctrine promises to produce the greatest court-shopping expedition since *Swift* v. *Tyson,* 1842, 16 Pet. 1, was overruled. See *Erie R. Co.* v. *Tompkins,* 1938, 304 U.S. 64 at 74-75. At the mere threat of strike action, carriers will be encouraged to seek out a court they think entertains views as to what is "reasonably necessary" most in accordance with those of its management. Courts will again became active protagonists in all railway labor disputes. If strike conditions become too onerous, there will always be a more palatable alternative to settling the strike—apply to the courts for exemption from the criminal and civil prohibitions of the Railway Labor Act. If successful, the strike then need never end, and the longer it lasts the more benefit accrues to the carrier.

The carrier in the courts below and in the present case contends that if this Court rejects the "suspension" and "reasonably necessary" exceptions doctrines, it will become impossible for a struck carrier to continue in operation, thus affording the unions an invincible bargaining advantage and maximizing the disruption of commerce which results from a strike situation.

As in any industry requiring a large supply of highly-skilled workmen, a strike in the rail industry will impose a substantial problem to a management seeking to continue its full operations in the face of the strike. The requirement of continuing in effect the contractually determined pay rates, rules and working conditions required by the Railway Labor Act may well impose an additional problem. But this does not

mean that operation is impossible. Fewer trains operated under the contractual conditions may well be the result of the unsuspended unexcepted application of the Railway Labor Act under strike conditions. Certainly this would be the result when compared to operation under any conditions which management might care to apply, or when "exceptions" are granted to assist the carrier by a federal court.

Operation is not impossible merely because the carriers assert it. The fact that the FEC abrogated all of its bargaining agreements in resuming operations does not mean that it would have been impossible for it to have continued in reduced service abiding by the contracts. The carrier's chief witness, R. W. Wyckoff, conceded as much (R. 330).

And it seems quite clear that in such event a strike of long duration would be highly unlikely. With both parties suffering from the dispute in direct proportion to its duration, some middle ground for compromise and settlement before too long would almost always be found. This, we submit, is the underlying premise of the statute's provisions. Congressional wisdom in this regard appears far more likely to prevent disruption of interstate commerce than the "ill-adapted judicial interference" of the Court below. See Frankfurter, J., dissent, *Elgin J. & E. Ry. Co.* v. *Burley*, (1945), 325 U.S. 711, 752. Certainly, the fact that this dispute continues unabated as the longest in American railroad history is no testimonial to the efficacy of the "reasonably necessary" exceptions doctrine in resolving strikes.

VI. "REASONABLY NECESSARY" EXCEPTIONS DOCTRINE, IF ADOPTED, SHOULD BE GOVERNED BY EQUITABLE PRINCIPLES IN HARMONY WITH THE PROVISIONS OF THE RAILWAY LABOR ACT AND THE NORRIS-LA GUARDIA ACT; ITS BENEFITS SHOULD NOT BE AVAILABLE TO A PARTY THAT HAS REJECTED VOLUNTARY ARBITRATION AND VIOLATED THE RAILWAY LABOR ACT'S PROCEDURES.

If this Court should adopt the "reasonably necessary" exception doctrine enunciated by the Court of Appeals in the *Trainmen's* case and followed in the present case petitioners alternatively suggest that application of such doctrine should be made to conform and harmonize in its operation with general equitable principles and with this Court's ruling in *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.,* 321 U.S. 50 (1944). This Court in that case unanimously held that the services of a federal court of equity, even in the traditional form of an injunction against violence, were not available to a railroad which had repeatedly rejected arbitration and thereby failed in its duty to make "every reasonable effort" to settle the dispute involved, a duty mandatorily imposed by Section 2, First, of the Railway Labor Act, 45 U.S.C. 152, and one which Section 8 of the Norris-La Guardia Act expressly makes a condition to the granting of equitable relief in a case arising out of a labor dispute, 29 U.S.C. 108. There, as here, both the striking unions and the railroad had initially rejected arbitration after exhaustion of the Railway Labor Act's procedures. There, as here, the dispute arose out of differences between the parties as to rates of pay and working conditions. There, as here, the dispute was "long-continued". There, as here, the unions (after the bombing of Pearl Harbor) changed their position in regard to arbitration and acceded to the National Mediation

Board's request for arbitration. There, as here, the railroad persisted in its refusal to accept arbitration.

Under these circumstances this Court held that the railroad's refusal to submit to voluntary arbitration precluded it from seeking the aid of injunctive relief from a federal court even against violence and other unlawful conduct. As the Court there stated (321 U.S. at 63):

> "Respondent is free to arbitrate or not, as it chooses. But if it refuses, it loses the legal right to have an injunction issued by a federal court, or to put the matter more accurately, it fails to perfect the right to such relief. This is not compulsory arbitration. It is compulsory choice between the right to decline arbitration and the right to have the aid of equity in a federal court."

Where the right to secure traditional equitable relief in the form of an injunction or temporary restraining order is precluded due to the continued intransigence of a carrier, surely the right to such extraordinary equitable relief as is here involved must be similarly precluded. The doctrine of "reasonably necessary" exceptions from mandatory federal legislation touches the outer limits of equitable discretion and power, and should not lightly be granted to an applicant with manifestly "unclean hands."

The factual background of this long-enduring labor dispute is, as described in the introductory statements herein, replete with willful, deliberate, and repeated violations of federal law and court orders by the FEC. To reward such a corporate scofflaw with extraordinary equitable relief would violate every traditional equitable notion.

Petitioners respectfully submit that the FEC in this case therefore should be barred from seeking the aid of this Court, and of the courts below, to grant it "reasonably necessary" exceptions from the Railway Labor Act's requirements in order to continue to operate under strike conditions. FEC has clearly refused, again and again, all requests to arbitrate this dispute (Exh. Vol., pp. 458-459, 460-461). Yet FEC is asking this Court, and the courts below, to relieve it from other onerous obligations imposed by the Railway Labor Act. Clearly under the holding and rationale of the *Toledo* case, as well as traditional principles of equity, such relief is not available to the FEC. This Court should limit the relief available under the Court of Appeals' doctrine of "reasonably necessary" exceptions to carriers who have substantially complied with existing federal law, if the doctrine should be adopted at all.

CONCLUSION

As has been said of the Norris-La Guardia Act, the Railway Labor Act is "the culmination of a bitter political, social, and economical controversy extending over half a century." *Milk Wagon D. Union* v. *Lake Valley F. Products,* 311 U.S. 91, 102 (1940). The delicate task of tampering with its machinery so as to adjust the balance of economic power which the Act strikes to suit judicial notions of fairness is risky business. That is a job for Congress. The courts are ill-equipped for such work. The judicial tailoring of the Railway Labor Act here attempted by the Court of Appeals after 40 years of the Act's relative success and in the face of prospective nationwide difficulties, can only be deemed ill-advised. The fullest measure

of labor peace in the railroad industry can only be assured by taking Congress at its untrammeled, unexcepted word. Untold strife in the coming difficult period of readjustment to technological advancements would be the result of this Court's holding that anything less than full enforcement of the "status quo" provisions satisfies the statutory scheme.

Where judicial exceptions can be spun out of whole cloth to effectuate the success of the economic weapons of one of the disputants engaged in battle, little hope for the settlement of disputes prior to this ultimate battle can be envisioned.

The decision of the Court of Appeals permitting judicial suspension of the Railway Labor Act's requirements should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Hereby Certify that a true copy of the foregoing Brief for Petitioners in No. 750 was served this 21st day of March, 1966, upon the following persons by depositing a copy of same addressed to each in the United States mail with sufficient first class postage prepaid:

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 750

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, ET AL., PETITIONERS

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 782

UNITED STATES OF AMERICA, PETITIONER

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 903) is reported at 348 F. 2d 682. The findings of fact and

conclusions of law of the district court (R. 180–189) are unofficially reported at 57 LRRM 2618. The preliminary injunction issued by the district court on October 30, 1964 (R. 189–191), and the order issued by the district court on December 3, 1964 (R. 223–225) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1965 (R. 911–912). By orders entered on October 15, 1965, and November 18, 1965, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 29, 1965. The petition in No. 750 was filed on November 18, 1965, and the petitions in Nos. 782 and 783 were filed on November 29, 1965. All three petitions were granted on January 24, 1966 (R. 913–914; 382 U. S. 1008). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 2, Seventh, of the Railway Labor Act (45 U.S.C. 152, Seventh) provides that "[n]o carrier * * * shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title [requiring notice to the bargaining representatives of the employees concerned, negotiation with those representatives, and access to mediation and arbitration before such changes are made]." The questions presented are:

1. Whether this prohibition continues to be generally applicable during a lawful strike against the carrier;

2. Whether, if the prohibition continues to be applicable during a strike, the court of appeals correctly held that the Act nevertheless permits "reasonably necessary" changes during a strike; and

3. Whether the United States has standing to maintain an action to enjoin violations of Section 2, Seventh.

STATUTES INVOLVED

The relevant provisions of the Railway Labor Act, as amended, 44 Stat. 577 (45 U.S.C. 151 *et seq.*), are set forth in Appendix A to this brief, *infra*, pp. 56–63.

STATEMENT

I

BACKGROUND

This case arises out of a strike on the Florida East Coast Railway (FEC) which has become the longest strike in American railroad history. The strike had its genesis in a dispute between the railroad and its nonoperating unions which arose in September, 1961. At that time, eleven non-operating unions[1] served notice under Section 6 of the Railway Labor Act (45 U.S.C. 156, *infra*, p. 62) upon virtually all Class I

[1] "Non-operating" unions are those representing employees who do not actually operate the trains, such as machinists, telegraphers, electrical workers and clerks. "Operating" unions are those representing employees such as trainmen, engineers and firemen. The non-operating unions were intervenors below and are the petitioners in No. 750.

railroads in the United States—including FEC—of their desire to revise existing agreements to provide for a general 25-cent-per-hour wage increase and a requirement of six-months advance notice of impending layoffs and abolition of job positions. The carriers—including FEC—counterproposed general wage cuts and elimination of all provisions requiring more than 24 hours notice of impending layoffs or job abolitions. The dispute thus created underwent negotiation and mediation as required by the provisions of the Railway Labor Act. (See Sections 6 and 5, First, of the Act, 45 U.S.C. 156, 155, First, *infra,* pp. 61–62). However, no settlement was reached in this manner.

Thereafter, a Presidential Emergency Board was created under Section 10 of the Railway Labor Act (45 U.S.C. 160, *infra,* p. 63) to recommend a settlement of the industry-wide dispute. After extensive hearings, the Board recommended a general pay increase of about 10 cents per hour and a requirement of at least 5 days' notice before job abolitions. In June, 1962, this settlement was accepted by every Class I railroad in the country except FEC.

Upon FEC's rejection of the national settlement, further mediation was invoked under the Railway Labor Act. Again no settlement was reached, and both FEC and the unions involved refused voluntary arbitration under Section 5, First, of the Act (45 U.S.C. 155, First, infra, p. 61). The strike of the non-operating unions which resulted in this litigation occurred on January 23, 1963, after a final round of negotiations also proved unsuccessful.[2]

[2] This account of the events leading up to the strike is taken from the report of a second Emergency Board created by the

When the non-operating unions struck, most operating employees refused to cross the picket lines. The railroad shut down for a short period but, on February 3, 1963, it resumed operations by employing supervisory personnel and replacements to fill the jobs of the strikers and those operating employees who would not cross the picket lines. In thus reinstating service, FEC disregarded the rates of pay, rules and working conditions set forth in its existing collective bargaining agreements with the unions representing its employees. As the district court subsequently found, replacements for striking employees at this time "made individual agreements with FEC concerning their rates of pay, rules and working conditions, on terms substantially different from the collective bargaining agreements in force for the relevant crafts or classes" (R. 182). This sweeping unilateral displacement of existing agreements, contrary to the express terms of Section 2, Seventh of the Act, essentially constitutes the basis of the complaint against FEC in this case.

On September 1, 1963, the broad changes in wages, rules and working conditions already effected unilaterally by FEC were formally promulgated in a document entitled "Conditions of Employment" (Exh. Vol. 4–35), which all new employees were subsequently required to sign before going to work (Exh. Vol. 75). Thereafter, on September 24, 1963, FEC served notices on all non-operating unions pursuant to Section 6 of the Railway Labor Act, proposing formally to abolish all existing collective bargaining

President to attempt to settle the FEC strike (Exh. Vol. 451–490).

agreements—which FEC had not complied with since reinstituting service—and permanently to substitute a slightly expanded version of the "Conditions of Employment," the so-called "Uniform Working Agreement" (Exh. Vol. 402–440; R. 313–321).[3] This document, like the "Conditions of Employment," incorporated sweeping departures from the rates of pay, rules and working conditions set forth in the existing collective bargaining agreements. For example, FEC proposed that it exercise exclusive control over discipline, promotions, job assignments and work rules and that seniority lists be broadly reorganized to abolish traditional craft lines.[4]

On October 18, 1963, FEC met with the unions to discuss this proposal pursuant to the requirements of the Act, but the meeting terminated when FEC insisted upon the presence of a court reporter. The unions then took the next statutory step by invoking the mediation services of the National Mediation

[3] On July 31, 1963, FEC had also served a statutory notice on the unions, proposing to amend the existing agreements by abolishing the union shop, effective September 1, 1963 (Exh. Vol. 376–379). A conference between FEC and the unions on this proposal broke up for the same reason as the subsequent conference on the comprehensive "Uniform Working Agreement," namely, FEC's insistence on the presence of a court reporter. Although the unions invoked the services of the National Mediation Board (Exh. Vol. 386–387), and the Board rejected FEC's contention that it was free to implement this proposal because the unions had failed to bargain (Exh. Vol. 394–395), FEC nonetheless unilaterally abolished the union shop provisions thereafter (Exh. Vol. 395–396).

[4] See Exh. Vol. 459.

Board relative to the proposed changes, but FEC insisted that the unions had forfeited mediation by terminating the prior conference (Exh. Vol. 440–441). The unions, in the interim, changed their previous position and, on April 3, May 17 and October 14, 1963, acceded to requests by both the Secretary of Labor and the National Mediation Board to submit the underlying wage and notice dispute to arbitration. FEC, however, continued to refuse arbitration (Exh. Vol. 459, 461).

Thereafter, on October 30, FEC unilaterally replaced the "Conditions of Employment" with the "Uniform Working Agreement," and refused to rescind this action when, on the following day, the National Mediation Board rejected the carrier's legal contention and docketed the dispute for mediation (Exh. Vol. 442–447).[5] After October 30, 1963, employees hired by FEC were required to sign copies of the "Uniform Working Agreement" (R. 283–284) as they had previously been required to sign the "Conditions of Employment." The mediation process in

[5] On November 9, 1963, after receiving the report of a Federal Board of Inquiry, composed of representatives from the Departments of Defense and Labor and the National Aeronautics and Space Administration, that "this labor dispute is currently and potentially detrimental to our Nation's defense and space efforts," and upon the recommendation of the National Mediation Board, the President created an Emergency Board to inquire into the FEC strike (Exh. Vol. 460–461). On December 23, 1963, this Board recommended that the railroad reinstate striking employees, accept the national settlement of the wage dispute prospectively, but not retroactively, and that other proposals of both parties should be withdrawn (Exh. Vol. 489–490).

regard to these permanent[6] changes has never been terminated; and as we have noted, the changes were originally made in the absence of any negotiation with the unions.

From October 30, 1963, until November 14, 1964, when the district court's injunction in this case (R. 189–191) took effect, FEC operated under the rates of pay, rules and working conditions set forth in the "Uniform Working Agreement." FEC enjoyed a substantial increase in its operating profit during this strike period.[7] By October, 1963, FEC was carrying approximately 95 per cent of the volume of carload freight which it had carried prior to the strike, and since that time it has been carrying carload freight at a volume equal to or exceeding pre-strike levels (R. 182, 363). FEC did not reinstate its passenger or less-than-carload freight services, which had been less profitable than its carload freight service (Exh. Vol. 459–460). FEC's operations during this period were carried on with about 650 employees as opposed to the approximately 2000 employees working in comparable pre-strike periods (R. 365–366).[8]

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[6] FEC has contended in these proceedings that the "Conditions of Employment" were meant to be operative only for the duration of the strike (Petition, No. 783, p. 5, n. 3). The court of appeals characterized this contention as "plainly specious" (*Florida East Coast Ry. Co.* v. *Brotherhood of R. Trainmen*, 336 F. 2d 172, 180 (C.A. 5), certiorari denied, 379 U.S. 990).

[7] This fact is revealed by FEC's annual and quarterly reports to the Interstate Commerce Commission and by FEC's 1964 Annual Report to Shareholders, p. 20.

[8] According to the Florida Public Utilities Commission, FEC's reinstatement of freight service was, in addition, marked by a disregard of standards of safe operation and a neglect of the maintenance of its right-of-way, structures, switches, signals and rolling stock (Exh. Vol. 459–460).

II

THE PRESENT SUIT AND THE *TRAINMEN'S* CASE

The United States instituted the present suit on April 30, 1964. In its complaint it alleged that FEC had violated the Railway Labor Act through its unilateral implementation, as to its non-operating employees, of changes in rates of pay, rules, and working conditions as embodied in the "Conditions of Employment" and the "Uniform Working Agreement." The United States requested that FEC be enjoined from continuing to implement such changes (R. 13–16). The non-operating unions of FEC were granted leave to intervene as plaintiffs.

Hearings were held before the district court in May, 1964.[9] Chief Judge Simpson delayed his deci-

[9] Railroad officials testified that FEC was continuing its program of recruiting replacements for strikers, but was only recruiting sufficient personnel to satisfy the requirements of the "Uniform Working Agreement," and not to meet the requirements of the negotiated collective bargaining agreements (R. 366). Before a Federal Inquiry Board convened on October 1, 1963, Winfred L. Thornton, President of FEC, stated that FEC anticipated hiring many fewer personnel than it employed prior to the strike "because we've been able to eliminate to a very large degree the featherbedding that's been in the railroad industry" (R. 366). He added that FEC, although faced with a strike, was raising its educational and physical requirements for new employees (R. 364–365). R. W. Wyckoff, Vice President of FEC, also claimed that "we were actually working under the rules that were negotiated" in the existing agreements, but merely "were deviating from those rules because of the shortage of manpower" (R. 293). Although FEC had sweepingly changed existing terms of employment through its unilateral implementation of the "Conditions of Employment," Mr. Wyckoff said that the Conditions of Employment never went into "effect" because "you can't change the rules that are

sion, however, because of the pendency before the court of appeals of *Florida East Coast Ry. Co.* v. *Brotherhood of R. Trainmen,* 336 F. 2d 172 (C.A. 5), certiorari denied, 379 U.S. 990, a parallel injunctive suit brought against FEC by a union representing operating employees and similarly complaining of FEC's unilateral institution of new wages, rules and working conditions.[10] On August 18, 1964, the Fifth Circuit ruled in the *Trainmen's* case that FEC had violated the Railway Labor Act by its wholesale unilateral abrogation of existing collective bargaining agreements. The court of appeals also ruled, however, that FEC could unilaterally institute such changes in its existing agreements as the district court found to be "reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions" (336 F. 2d at 182). The court remanded the case to the district court to determine what, if any, departures from existing agreements met that test (336 F. 2d at 182–183). This court denied the union's petition for a writ of certiorari (379

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in effect unless you go through the process of the Railway Labor Act" (R. 294–295).

Mr. Wyckoff also stated that FEC was not faced with an emergency situation with respect to freight service (R. 312), and that it could have operated in full compliance with its agreements, albeit on a very reduced basis (R. 330). Specifically, he estimated that with FEC's present work force, it would have to reduce operations about 50 per cent to comply fully with its agreements, and would need to hire 600 additional employees to comply fully with the agreements, and maintain full freight service (R. 353–354).

[10] On March 2, 1964, Judge Simpson had issued a preliminary injunction in the *Trainmen's* case ordering FEC to reinstitute and maintain the rates of pay, rules, and working conditions

U.S. 990).[11] The district court subesquently entered injunctions in both this case and the *Trainmen's* case (R. 189–191) requiring FEC to abide by all the rates of pay, rules and working conditions specified in the existing collective bargaining agreements until the termination of the statutory mediation procedures "except upon specific authorization of this Court after a finding of reasonable necessity therefore upon application of the FEC to this Court * * *."[12]

On November 12, 1964, FEC filed an application in the district court for the approval of certain "reasonably necessary" departures from its existing agreements with its non-operating unions pursuant to the *Trainmen's* decision. The district court held hearings on this application (R. 593–898), and on December 3, 1964, it granted some of the requests and denied others (R. 223–225). Specifically, FEC was permitted to exceed the ratio of apprentices to journeymen and age limitations set forth in the agreements, to contract out

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contained in its existing collective bargaining agreement with the Trainmen's union. On March 14, 1964, the Fifth Circuit stayed that injunction pending appeal.

[11] The Fifth Circuit also held in that case that FEC could institute certain work rules applicable to operating employees, as to which the statutory procedures concededly had been exhausted. The unions had urged that FEC's proposal to implement the "Uniform Working Agreement" had superseded the proposal to change the agreements in the manner set forth in the earlier proposal. Those changes in work rules were not applicable to non-operating unions, and therefore do not affect this case.

[12] The injunction was issued on October 30, 1964, but FEC was given two weeks to come into compliance. When FEC filed its application for approval of certain employment prac-

certain work, and to use supervisory personnel to perform certain jobs for which FEC had shown that properly trained personnel were unavailable. The district court denied, however, FEC's requests that it be allowed to disregard completely craft and seniority district restrictions (*i.e.*, that FEC be allowed to work under whatever work rules it desired), that it be allowed to use supervisors to perform craft work any time it decided that it did not have sufficient personnel, that it be relieved of its obligations to furnish seniority rosters, and that the union shop be declared "void and unenforceable" as to employees hired after January 23, 1963.[13]

Both sides appealed. FEC took the position, which had been rejected in the *Trainmen's* decision, 336 F. 2d at 180, that its agreements were totally "suspended" for the duration of the strike, and that it therefore could operate under any work rules it desired during the strike.[14] The United States contended, on the

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tices on November 12, 1964, the district court further stayed the injunction insofar as it would have prevented FEC from continuing in effect the departures from its collective bargaining agreements for which it sought authorization (R. 222).

Because FEC's application for authorizations to depart from its agreements (R. 216–220) was so sweeping as virtually to deprive the injunction of any force, the stay thus had the practical effect of delaying the enforcement of the injunction until December 10, 1964, the effective date of the district court's Order of December 3, 1964, granting some departures as "reasonably necessary." (See R. 225).

[13] The last request was made in the face of an explicit prior holding by the Fifth Circuit (336 F. 2d at 182) that FEC had violated the Act when it unilaterally abolished the union shop provision. See footnote 3, *supra*, pp. 5–6.

[14] FEC also contended that the district court erred in requiring it to make a showing of the reasonable necessity of the

other hand, that the Act forbids a railroad from unilaterally implementing any changes in rates of pay, rules or working conditions, unauthorized by existing collective bargaining agreements; that this prohibition applies during a strike; and that the district court and court of appeals had therefore erred in permitting any suspension of the agreement in this case. The court of appeals affirmed on the basis of its prior decision in the *Trainmen's* case, reiterating that, although the carrier's right of self-help "is not a license for wholesale abrogation of the agreement," FEC could, upon authorization by the district court, "institute and maintain such employment practices, etc. as are, and continue to be, reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions." 348 F. 2d at 686.

ARGUMENT

INTRODUCTION AND SUMMARY

Section 2, Seventh, of the Railway Labor Act (45 U.S.C. 152, Seventh) provides that "[n]o carrier * * * shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title." Section 156 (Section 6 of the Act) and the sections to which

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deviations from its agreements before implementing them, rather than allowing FEC to work under the rules it desired and requiring the United States or the unions to attempt to prove that the departures were not reasonably necessary. FEC further urged that the district court erred in not granting certain of the specific requests, such as the request that the union shop be declared "void and unenforceable" as to new employees.

it, in turn, refers (Sections 5 and 10 of the Act, 45 U.S.C. 155, 160) require that, before such changes are made, the carrier serve notice upon the bargaining representatives of the employees concerned, and that it negotiate with those representatives over the proposed changes. Mediation under the auspices of the National Mediation Board may be invoked by either party or by the Board itself, the parties are encouraged to submit their dispute to binding arbitration if mediation fails and, in some circumstances, a Presidential Emergency Board may be created to recommend the basis of a settlement. Each of these provisions for negotiation, mediation, arbitration and an Emergency Board reiterates that no changes in existing rates of pay, rules, and working conditions are to be made by the carrier while a negotiated solution to the dispute is thus being attempted.

It is conceded that, in the ordinary case, these provisions prohibiting a carrier from making unilateral changes without prior negotiation are fully and literally effective. *E.g., Manning* v. *American Airlines,* 329 F. 2d 32 (C.A. 2), certiorari denied, 379 U.S. 817; *Butte Anaconda & P. Ry. Co.* v. *Brotherhood of L. F. & E.,* 268 F. 2d 54 (C.A. 9), certiorari denied, 361 U.S. 864; *R.R. Yardmasters* v. *Pennsylvania R. Co.,* 224 F. 2d 226 (C.A. 3); *Ry. Employees' Coop. Ass'n* v. *Atlanta B. & C. R.,* 22 F. Supp. 510 (D. Ga.). It is common ground, therefore, that a carrier may

not ordinarily change rates of pay, rules or working conditions without the agreement of the union or unions involved unless it first subjects the proposed changes to all the statutory negotiation and mediation processes. Any attempt by the carrier to do otherwise may be enjoined. The question presented in this case is whether this prohibition upon unilateral, non-negotiated, changes remains applicable during a lawful strike against the carrier, or whether, once a lawful strike commences, a carrier may immediately and unilaterally institute either sweeping or limited changes in agreements setting wages, rules or working conditions without regard to the obligation to negotiate or subject disputes to mediation.

In our view, the Act's prohibitions remain fully applicable during a lawful strike. The language of the Act is unqualified and the rigorous system for compelling negotiation of all proposed changes in agreement setting wages, rules, and working conditions admits of no implicit exception during a strike. Even more importantly, any such exception would inevitably subvert the Act's orderly procedures for negotiating all disputes by encouraging carriers to seek to achieve favorable settlements through the use of unilateral action rather than negotiation. We discuss these reasons in the first section of this brief.

While the court of appeals in this case agreed that the Act's prohibitions should therefore be applied to forbid the sweeping unilateral changes in wages, rules and working conditions which the carrier in this case sought to institute at the onset of the strike, it held that the Act does not prohibit unilateral strike

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changes in agreements where "reasonably necessary" to "effectuate" the carrier's right to operate during the strike. The changes actually permitted by the district court in this case were narrow. The "reasonably necessary" rule under which they were made, however, is one of uncertain and potentially broad application and we urge its reversal. In the first place, like the broader argument for unlimited changes urged by the carrier here, the court of appeals' rule is contrary to the explicit *status quo* provisions of the Act. Moreover, to the extent that such a rule might be used, in the future, to permit important unilateral changes under the excuse of "necessity," the rule will constitute a serious dilution of the statutory requirements only slightly less significant than a permission to make unlimited changes. In addition, the existence of such a rule, by holding out to a carrier the possibility of obtaining, at the onset of a strike, substantial and immediate unilateral deviations from conditions as set by its collective bargaining agreements, is itself disruptive regardless of the deviations from the agreement ultimately obtained in particular cases. A "reasonably necessary" exception to the Act's provisions has never before been thought necessary by any court, nor has it been invoked by carriers before this case. In light of its substantial dangers and uncertain content and the lack of necessity for its creation, the exception should, we believe, be rejected by this Court. We discuss this contention in the second section of this brief.

The final issue in this case concerns the standing of the United States to bring this suit for injunction

under the Railway Labor Act. In our view, a clear basis for the standing of the United States is found in the provision of Section 2, Tenth, of the Railway Labor Act (45 U.S.C. 152, Tenth) which expressly authorizes the United States to prosecute "all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof * * *". The United States also has standing here in order to protect the jurisdiction of the National Mediation Board, a jurisdiction which has been meaningfully frustrated in this case by FEC's unilateral implementation of changes in pay rates, rules and working conditions prior to the exhaustion of the statutory procedures supervised by that body.

I

A CARRIER SUBJECT TO THE RAILWAY LABOR ACT MAY NOT UNILATERALLY CHANGE RATES OF PAY, RULES, OR WORKING CONDITIONS AS PROVIDED IN EXISTING COLLECTIVE BARGAINING AGREEMENTS BECAUSE OF THE EXISTENCE OF A LAWFUL STRIKE

Under the Railway Labor Act (45 U.S.C. 151 *et seq.*) a carrier is expressly forbidden unilaterally to alter existing agreements setting rates of pay, rules or working conditions. Such proposed changes must first be submitted to negotiation and governmental mediation (if the affected union or the National Mediation Board so request); there must, in addition, be access to binding arbitration and in some instances, to the recommendation of a Presidential Emergency Board. Before these procedures are invoked—and while they are in progress—the *status quo* must be

maintained. No less than four separate provisions of the Act contain this requirement.[15]

A carrier's obligation under the Act to negotiate before instituting changes is thus stated in absolute and wholly unqualified terms; no "strike conditions" exception is recited or implied. In this case, however, FEC unilaterally instituted sweeping changes in its existing agreements through its implementation of the "Conditions of Employment" and the "Uniform Working Agreement," and the carrier refused to withdraw this action after statutory bargaining had commenced. Such action was in plain violation of the Act's terms. FEC urges, however, that its conduct was not unlawful because these changes were instituted by it only after the occurrence of a strike called by the unions upon the breakdown of negotiations over a wage and notice dispute which had fully exhausted the statutory bargaining process. FEC thus contends that a lawful strike over one dispute, after all statutory negotiation has been exhausted with regard to that dispute, justifies a carrier in making immediate unilateral changes in any other conditions of employment. This contention is not only

[15] The Act is, in this regard, much more explicit and affirmative a system of regulation than is the National Labor Relations Act, which requires negotiation as a predicate to changes in existing wages or working conditions only insofar as that is necessary to satisfy a generalized duty to bargain in good faith. This Court has recognized that "[t]he relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as these which form the basis of the National Labor Relations Act," see *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 31–32, n. 2. See, also, footnote 27, *infra*, p. 37.

inconsistent with the plain words of the statute, but would result in the virtual destruction of the fundamental plan of the Act to require negotiated solutions to railway labor disputes.

A. THE UNQUALIFIED TERMS OF THE RAILWAY LABOR ACT PROHIBIT UNILATERAL CHANGES IN EXISTING AGREEMENTS WITHOUT PRIOR COLLECTIVE BARGAINING

We turn first to the text of the Act. Two separate classifications of labor disputes, subject to different required procedures of settlement, are identified.

(1) The first class of disputes, so-called "minor" disputes, are not directly involved in this case. These are disputes over the application of existing agreements, *i.e.*, "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * *." (Section 3, First (i), 45 U.S.C. 153, First (i), *infra*, p. 60). These disputes "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of" the National Railroad Adjustment Board. This is a board of arbitration composed of equal numbers of carrier and union representatives and, where necessary, of a neutral referee selected either by the members of the board or by the National Mediation Board (*ibid.*); see also Section 3, First (a)(1); 45 U.S.C. 153, First (a)(*l*), *infra*, p. 60). The adjustment boards' decisions of minor disputes shall "be

final and binding upon both parties to the dispute * * * (Section 3, First (m), 45 U.S.C. 153, First (m)). Judicial enforcement of adjustment board orders may be obtained in the district courts, where the findings of the board "shall be prima facie evidence of the facts therein stated * * *" Section 3, First (p), 45 U.S.C. 153, First (p)).

This Court has found it implicit in these provisions that they are the exclusive means of settling "minor" disputes. Thus, a union may not engage in a strike as a means of compelling a non-statutory settlement; and such a strike will be enjoined. *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30. Similarly, an employer may not resort to unilateral action "to defeat the jurisdiction of the Adjustment Board through economic pressure rather than arbitration." *Id.*, 353 U.S. at 34, n. 8.

(2) The disputes immediately relevant to this case are not "minor" disputes over the application of an existing collective bargaining agreement, but so-called "major" disputes over proposed *changes* in existing rates of pay, rules and working conditions as provided in present agreements. In these disputes, the carrier seeks admitted departures from the existing terms of employment, to which the union does not agree. One of these disputes in this case—the wage and notice dispute which was the precipitating cause of the strike of FEC—has been through the full processes of statutory negotiation and mediation, including the convening of a Presidential Emergency Board. There is no question as to this dispute that,

having fully complied with its statutory obligation to bargain, FEC may now make changes in existing wage and notice provisions so long as those changes do not go beyond the proposals over which it has negotiated. *Flight Engineers Int'l Ass'n* v. *Eastern Air Lines,* 208 F. Supp. 182 (S.D.N.Y.), affirmed, 307 F. 2d 510 (C.A. 2), certiorari denied, 372 U.S. 945.

The question here concerns the second of the relevant major disputes, *i.e.,* FEC's sweeping revision of existing rules and employment conditions as embodied in the "Conditions of Employment" and the "Uniform Working Agreement." There has never been full statutory bargaining over these changes, and they were instituted before such bargaining commenced. The question is whether these changes—as to which the statutory processes have never been exhausted—may lawfully be made by the carrier, contrary to the terms of the Act, because of the existence of strike conditions caused by the separate wage and notice dispute.

The provisions of the Act which, in our view, prohibit a carrier from taking such action in all circumstances are as follows:

(i) Section 2, Seventh (45 U.S.C. 152, Seventh, *infra,* p. 57), provides that:

> No carrier, its officers or agents shall change the rates of pay, rules or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

FEC's action in unilaterally substituting the "Conditions of Employment" and, subsequently, the "Uni-

form Working Agreement," for its existing collective bargaining agreements, without submitting its proposals to the statutory bargaining procedures, was in plain violation of this provision. Indeed, by first changing the pay, rules and conditions in effect and then formally proposing to do what it had already done, FEC did exactly what the Act forbids. *E.g.*, *Manning* v. *American Airlines, supra,* 329 F. 2d 32, 35.

(ii) Section 156 (Section 6 of the Act, 45 U.S.C. 156, *infra,* p. 62), describes the first steps of the required bargaining. The carrier (or the union, where it proposes changes in existing conditions) must give at least thirty days' written notice of intended changes in agreements. A conference between the parties must be arranged within this period. Here again the Act unequivocally states that "rates of pay, rules, or working conditions shall not be altered by the carrier * * *" pending such negotiation (*ibid.*). FEC, however, implemented sweeping changes before negotiation took place, and it did not suspend the changes during the course of negotiation.

(iii) If the required face-to-face negotiation between the parties does not result in agreement, Section 5, First of the Act (45 U.S.C. 155, First, *infra,* p. 61), then provides that either party to the dispute may request the services of the National Mediation Board, as the non-operating unions did here after their conference with FEC had terminated (see Statement, *supra,* p. 6). The Mediation Board may, in addition, proffer its services on its own initiative. In either event, the Board is required to attempt, through mediation, to bring the parties to an agree-

ment. The provision of Section 6 of the Act, quoted in the previous paragraph, forbidding the carrier to alter agreements setting wages rules or working conditions during negotiations, is expressly made of continued applicability while the dispute is thus under mediation. FEC, however, maintained its unilaterally imposed changes after mediation was invoked by the unions and while such mediation has been in progress.[16]

(iv) If mediation is unsuccessful, the Mediation Board is further required by Section 5, First, to "endeavor * * * to induce the parties to submit their controversy to arbitration." If arbitration is refused by one or both parties, the board must then notify the parties that its mediatory efforts have failed. Even in this event, however, "no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose" for thirty days after the termination of mediation. Mediation has never been terminated in this case as to FEC's broad work-rules proposals.

(v) The Act's final provision, where other negotiation procedures fail, calls for the establishment by the President of an *ad hoc* Emergency Board to investigate and make recommendations concerning disputes which "threaten substantially to interrupt interstate commerce to a degree such as to deprive any

[16] In the event that mediation is not requested by the parties and the mediation board does not proffer its services, the Act provides that "rates of pay, rules, or working conditions shall not be altered by the carrier * * * unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board" (Section 6 (45 U.S.C. 156), *infra*, p. 62).

section of the country of essential transportation service." Once again the Act unqualifiedly forbids unilateral changes "in the conditions out of which the dispute arose" until thirty days after the Emergency Board has made its report to the President.

In sum, four separate provisions (Section 2 Seventh; Section 5, First; Section 6; and Section 10) of the Railway Labor Act explicitly forbid a carrier unilaterally to change existing agreements setting rates of pay, rules or working conditions,[17] but require it first to subject such proposed changes to bargaining with the representatives of the affected employees. The required processes of such bargaining—notice, negotiation, mediation, and access to arbitration and the recommendations of a Presidential Emergency Board—are set forth in specific detail and no exceptions are suggested. FEC in this case unilaterally implemented both the "Conditions of Employment" and the "Uniform Working Agreement" without ever conducting negotiations with the statutory bargaining representatives, nor did FEC

[17] The uniform understanding seems to be that the statutory prohibitions are also applicable to changes in existing conditions which were originally set through collective bargaining, even though the collective agreement may formally have terminated. See *Western Air Lines* v. *Flight Engineers Int'l. Ass'n.*, 194 F. Supp. 908, 909 (S.D. Cal.). The issue, in all events, ordinarily does not arise, for collective agreements in industries subject to the Railway Labor Act—including the agreements in this case—do not terminate on a fixed date, but traditionally continue in force until a new agreement is reached. (See, *e.g.*, Rule 76, Agreement Between FEC and Clerical and Station Employees, Prescribed by the Brotherhood of Railway and

suspend its changes once the statutory procedures had been invoked and negotiations and mediation were in progress. This action was therefore in plain violation of the Act.

B. THE PURPOSES OF THE RAILWAY LABOR ACT DO NOT PERMIT AN EXCEPTION TO THIS UNQUALIFIED PROHIBITION BECAUSE OF A LAWFUL STRIKE

Exceptions from the plain terms of the Railway Labor Act are justified only by a "clear showing of a contrary or qualified intention of Congress." *Brotherhood of Railroad Trainmen* v. *Chicago, R. & I. R. Co.*, 353 U.S. 30, 35. The relevant legislative history of the Act, summarized in the footnote, gives no support whatsoever to such strike qualification upon the Act's negotiation requirements and FEC has not suggested otherwise.[18] Moreover, as we

Steamship Clerks, etc., pp. 88–89, providing that "[t]his agreement * * * shall continue in effect until changed as provided herein or in accordance with the Railway Labor Act * * *"). Once the negotiation and mediation process has been exhausted with regard to particular proposed changes, the carrier may amend the existing agreement by implementing those changes. See *Flight Engineers Int'l Ass'n.* v. *Eastern Air lines*, 208 F. Supp. 182 (S.D.N.Y.), affirmed, 307 F. 2d 510 (C.A. 2), certiorari denied, 372 U.S. 945.

[18] Section 2, Seventh, was enacted in 1934 as an amendment to the Act for the purpose of clarifying and strengthening the "status quo" provisions which have always been contained in Section 6 and 10 of the Act. These provisions had always been understood as requiring the parties to a dispute to maintain the "status quo" pending the statutory negotiation process; that is, the carrier may not change the rates of pay, rules and conditions of its employees during that time, or lockout its employees, and the union may not strike over its demands while mediation is in process. Mr. Donald Richberg, one of the

now show, such an exception, generally permitting unlimited unilateral changes in existing agreements because of the occurrence of a lawful strike over a narrowly defined dispute which had been subjected to all the statutory procedures, would be wholly inconsistent with other provisions of the Act and with its fundamental purpose "to provide for the prompt and orderly settlement," between an employer and the statutory representatives of his employees, "of all disputes concerning rates of pay, rules, or working con-

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authors of the original bill, stated in this regard: "As to maintaining the status quo from the time that a dispute is engendered, it is a violation of the duties imposed by this law for either party to take any action to arbitrarily change the conditions until that dispute has been adjusted in accordance with the law. Their primary duty is to exert every reasonable effort to avoid interruptions of commerce through disputes." (Hearings on H.R. 7180, House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. (1926), pp. 92-93). The House Committee Report which accompained the bill similarly stressed the initial obligatory steps to be taken by the parties, in disputes over changes in pay, rules and conditions, and expressed the hope that this mandatory procedure would lessen the interruptions to interstate commerce, which had been frequent in the years just prior to the passage of the Act. See H. Rep. No. 328, 69th Cong., 1st Sess. (1926), p. 1. See also Hearings on H.R. 7180, House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. (1926), p. 199.

In 1934, when Congress undertook to strengthen both the mandatory and voluntary features of the Act, it added Section 2, Seventh, which flatly, and without qualification, broadly forbids carriers to change the rates of pay, rules and conditions of its employees in any manner other than that set forth in the agreements or in Section 6 of the Act. Thus the statute now not only negatives changes during statutory negotiations, but it also states affirmatively that changes may only be made *through* negotiation. There is nothing in the legislative history either of this amendment or the original Act to suggest that this requirement may not be applicable in strike conditions.

ditions." (Section 2, 45 U.S.C. 151a(4); see also Section 2, First, 45 U.S.C. 152, First; *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 725).

It is clear that the duty of a carrier to attempt to settle major disputes with representatives of the employees concerned is not suspended during a strike. And, as the court of appeals recognized in this case, the union which represented the employees in a given craft or class prior to the strike unquestionably remains the representative of such employees for this purpose—whether or not they are union members—while a strike is in progress.[19] See, also, *Steele* v. *L. & N. R. Co.*, 323 U.S. 192; cf. *Brotherhood of R. Trainmen* v. *Howard*, 343 U.S. 768. It is equally clear that employees who remain at work during a strike—regardless of whether they were pre-strike employees or are replacements and regardless of their union membership—are entitled to the benefits of any existing collective bargaining agreements covering the class or craft in which they work.[20]

Thus, while the onset of a lawful strike, after the statutory negotiation procedures are fully exhausted in relation to a particular major dispute, permits the employer to implement the changes as to which nego-

[19] The Railway Labor Act, unlike the National Labor Relations Act, 29 U.S.C. 151, contains no provision for decertification of a union which loses its status as majority representative.

[20] Thus, if a union called a strike against a carrier, and only half the union members went on strike, the carrier clearly could not deprive the nonstriking members, or their replacements, of the benefits of wage and hour provisions in existing agreements, even by entering into individual agreements with employees. *J. I. Case Co.* v. *NLRB*, 321 U.S. 338; *Order of R. Telegraphers* v. *Ry. Express Agency*, 321 U.S. 342.

tiation has taken place, such a lawful strike clearly cannot relieve an employer of the obligation to bargain with the striking union over *other* proposed changes which have never been subjected to negotiations. Nor can it deprive workers, who either stay on the job or who replace strikers, of the benefits of the provisions of existing collective bargaining agreements which have not been lawfully amended or changed. If FEC wished to continue to operate during a lawful strike, therefore, it was required to operate pursuant to its collective agreements and it was bound to negotiate with its unions over any changes proposed in those agreements.

"Major" disputes over separate issues are, in other words, completely severable for purposes of determining when an employer may act to implement changes with which its unions do not agree. The pendency of mediation over one issue does not prevent a carrier from implementing proposals as to which mediation has been completed; nor are the unions prohibited from striking over that issue, *Pan American World Airways, Inc.* v. *Flight Engineers Int'l Ass'n.*, 306 F. 2d 840 (C.A. 2). Conversely, however, unilateral changes with respect to issues as to which bargaining has either never commenced or not been completed is not permitted merely because bargaining has been exhausted with respect to other issues. See *Pullman Co.* v. *Order of Ry. Conductors*, 316 F. 2d 556, 561–563 (C.A. 7), certiorari denied, 375 U.S. 820, reversing 49 LRRM 3162 (N.D. Ill. 1962).[21]

[21] See also *Airline Pilots Ass'n* v. *Southern Airways, Inc.*, 49 L.R.R.M. 3145, 3149 (M.D. Tenn. 1962), recognizing "the general rule, now well established, that the right of a party to

Thus, both the union's continuing status as bargaining representative during a strike and the continued obligation to obey existing collective agreements as to workers employed during that period negate any strike exception from the Act's prohibitions upon unilateral employer changes.

In addition, if a lawful strike over one dispute furnished an excuse for an employer unilaterally to change other aspects of his employee and union relationships, the general fundamental policy of the Act to require negotiated, rather than unilateral, solutions of labor disputes would be seriously—and perhaps entirely—undermined. Take, for example, the effect of such a rule upon the settlement of the dispute leading to the strike. Under the proposed rule a carrier would be permitted to use the occasion of a strike over a wage or hours dispute to make immediate sweeping changes in its work-rules to permit operation on favorable terms which could not conceivably have been obtained through negotiation. Taking advantage of this opportunity in this case, for example, FEC abolished numerous job positions and conducted strike operation only of its profitable carload freight service, abandoning passenger service and less profitable freight services.[22] Hav-

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effect changes [during a strike] is not enlarged beyond the scope of the Section 6 opener simply because procedural steps of the act have been pursued."

[22] Winfred L. Thornton, President of FEC, testified that "we've been able to eliminate to a very large degree the featherbedding that's been in the railroad industry" (R. 367). See also, footnote 9, p. 9, *supra*, and the statement, p. 8, *supra*, indicating that FEC has substantially resumed profitable operations during the strike.

ing made such changes, a carrier might naturally have little incentive to reach a settlement of the dispute which led to the strike, and indeed, might have strong reason to prolong the strike. In some circumstances, a temptation would undoubtedly even be created for a railroad or airline to precipitate a strike over one issue—or to make no effort to avoid a strike by bargaining in good faith with respect to the union's demands—in order to permit the carrier thus unilaterally to abrogate the entire collective bargaining agreement on the most favorable terms.

At the very least, whether the carrier wishes a settlement or not, suspension of the bargaining requirements during the course of a strike will inevitably and detrimentally broaden the area of dispute between the parties. Changes in pay, rules and conditions unilaterally effectuated by the carrier at the onset of the strike will surely constitute new issues between the parties. FEC's unilateral changes here, for example, have superimposed disputes over radical changes in work-rules and conditions onto an existing wage and notice dispute of relatively narrow compass. These unilateral changes have, without question, decreased the likelihood of a prompt settlement of the underlying strike, regardless of the good faith of the parties. The underlying wage and notice dispute in this case has been settled on every other railroad in the United States, and the National Mediation Board has found that it "could and should be resolved by a small amount of bona fide collective bargaining" between FEC and the unions here. (Exh. Vol. 457). There is no doubt that FEC's sweeping unilateral

abrogation of its collective agreements in favor of rules of its own devising has helped to forestall such a negotiated solution.

A strike-conditions exception would, in addition, have the same debilitating effect upon the process of negotiations with regard to the major dispute created by the carrier's unilateral, strike-imposed changes. Where, as here, the carrier has filed a notice under Section 6 of the Act seeking to impose those changes permanently, as well as during the strike, the parties would be placed in the position of discussing "proposed" changes which are already in effect. Meaningful bargaining or mediation cannot possibly be undertaken in these circumstances. See, *e.g.*, *Manning* v. *American Airlines*, 329 F. 2d 32, 35 (C.A. 2), certiorari denied, 379 U.S. 817; *Butte, Anaconda & P. Ry. Co.* v. *Brotherhood of L. F. & E.*, 268 F. 2d 54 (C.A. 9), certiorari denied, 361 U.S. 864. As the court of appeals here realized, the processes of bargaining and mediation called for by the Act are thus "a sham if a Carrier has already done in fact what it formally seeks to do in negotiation of a § 6 notice." *Florida East Coast Ry. Co.* v. *Brotherhood of R. Trainmen, supra*, 336 F. 2d at 180.[23]

A strike conditions exception would, in sum, be totally inconsistent with the statutory scheme for

[23] The Emergency Board which sought to recommend a settlement of the strike in this case, believed that FEC's actions probably had the very effect noted in the text. In light of FEC's unilateral implementation of its Uniform Working Agreement during the strike (while FEC proposed, under Section 6, to negotiate over the permanent implementation of the Uniform Working Agreement) the Board stated in re-

bargaining in the railway and airline industries. Under it, a struck carrier, wishing to establish broad changes in work rules or conditions of employment, would be entitled unilaterally to implement the rules if desired at the onset of a strike, even though wholly separate issues had precipitated the strike. The carrier would then be encouraged adamantly to refuse to bargain further over the dispute which caused the strike and await the termination of mediation over its proposed sweeping changes—mediation which would in turn almost necessarily prove fruitless because of the carrier's previous implementation of the changes it seeks. Upon the eventual termination of mediation, all the proposed changes might be instituted regardless of the union's wishes. In this way, a carrier, as the consequence of a lawful strike over one issue, would be able permanently to change the wages, rules and working conditions of its employees as it desired without ever subjecting these changes to meaningful negotiation or mediation with the representatives of its employees.

These results would follow, moreover, whether the unilaterally instituted changes made at the onset of the strike are formally imposed permanently—as in this case—or whether they are announced as effective only for the duration of the strike. In either case the strike-imposed changes may be accompanied by a proposal to institute identical changes permanently and in either case they make all the issues between

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sponse to FEC's expressed desire to have the Emergency Board make recommendations as to all its proposed changes (in addition to the underlying wage and notice dispute), that "we doubt whether the Carrier genuinely desires the Board to consider these matters" (Exh. Vol. 464).

the parties more difficult of settlement. There is simply no justification for injecting these disruptive elements into railway-labor relationships contrary to the plain language of the statute. For these reasons, we submit that the specific terms of the statute, unqualifiedly prohibiting a carrier from unilaterally imposing changes in existing wages, rules, or working conditions without prior negotiation, remain fully applicable during the course of a lawful strike.[24]

II

THE COURT OF APPEALS ERRONEOUSLY CREATED AN EXCEPTION PERMITTING UNILATERAL CHANGES BY A CARRIER IN AGREEMENTS SETTING WAGES, RULES, OR WORKING CONDITIONS WHEN "REASONABLY NECESSARY" TO A CARRIER'S OPERATIONS DURING A STRIKE

The court of appeals in this case recognized that, as urged in the preceding section of this brief, the terms and purposes of the Railway Labor Act plainly require that there be no exception permitting a carrier immediately to make sweeping unilateral changes in rates of pay, rules, or working conditions as set by existing agreements upon the occurrence of a lawful

[24] A similar rule, forbidding an employer to ignore the duty to bargain with the union merely because of the existence of a strike—or to ignore existing collective agreements during that time—also applies under the National Labor Relations Act as an element of the obligation of an employer to bargain in good faith with the representatives of his employees. See, e.g., *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221; *Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247; *National Labor Relations Board* v. *Peacheur Lozenge Co.*, 209 F. 2d 393, 403 (C.A. 2). This is true, even in the absence of explicit *status quo* provisions in that Act. See footnote 27, *infra*, p. 38.

strike. The court held, however, that an exception to the Act should be created, whereby a carrier would be permitted, unilaterally and without any adherence to the statutory negotiation and mediation procedures, "to institute and maintain such employment practices, etc. as are, and continue to be, reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions." 336 F. 2d 181–182.

While this exception is stated as being more limited in application than the total suspension of existing collective agreements during the course of a strike which has been urged by FEC, it is invalid for essentially the same reasons. Like the broader exception, it is directly contrary to the unambiguous language of the Act providing that "[n]o carrier * * * shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title." Like the broader exception, it also ignores the continuing status of the union as bargaining representative under the Act—and thus its continuing right to be consulted about all changes—as well as the right of employees who work during a strike to the benefits and rules of existing collective bargaining agreements covering the jobs in which they work. Finally like the broader exception, it is also likely to constitute a troublesome and disruptive element in railway labor relations by standing as a barrier to negotiated solutions of major disputes between carriers and unions.

A. THE SAME DANGERS INHERE IN A "REASONABLY NECESSARY" EXCEPTION AS IN A BROAD RULE OF TOTAL SUSPENSION OF EXISTING AGREEMENTS

We recognize that, as so far applied by the district judge in this case, the court of appeals' principle has been used here to permit only relatively minor unilateral changes in FEC's existing collective bargaining agreements (see Statement, *supra,* pp. 11–12). These changes thus permitted are, however, within the broad changes which FEC seeks to institute permanently through its proposal, under Section 6 of the Act, to replace its existing collective bargaining agreements with the "Uniform Working Agreement." To the extent that some proposed permanent changes have thereby been unilaterally instituted by FEC without negotiation or mediation, the dangers, described in the preceding section of this brief, of defeating meaningful good faith bargaining over such proposed changes and of broadening the area of dispute and thus lessening the chances of settling the underlying strike, are fully present in this case.

Our principal concern, however, is for the potential future impact upon railway labor relationships of the "reasonably necessary" principle. The application of this principle is by no means limited to trivial variations in existing conditions, for its touchstone is the carrier's "right" to "operate" regardless of strike adversity. There is no reason, therefore, why the principle, if valid, should not be invoked in the future to permit sweeping unilateral changes in wage rates, hours of work, and work rules and conditions where a carrier correctly asserts that shortages of manpower and financial hardship during a strike necessitate such

changes if it is to continue operations. Radical revisions in job descriptions and requirements may also be justified and, under this principle, a carrier may also use a strike to alter the form of service offered to the public. In this case, for example, FEC sought to change its agreements during the strike to enable it to carry only carload freight—but not to carry less than carload freight or to offer passenger service—and it also sought to use the strike to eliminate "featherbedding" by operating with a vastly reduced work force.[25] In addition, the principle may be used, where some strike operation is possible under existing agreements, to permit even more expanded operation. Here, for example, FEC officials testified that the carrier could have operated at 50 percent of its freight capacity in strict accord with its agreements, yet "reasonably necessary" changes were still permitted.[25a]

Thus, changes "reasonably necessary" to strike operations may well constitute the most comprehensive revisions of employment conditions. To this extent, the "reasonably necessary" exception, no less than the broadly stated argument of total suspension of existing agreements during strike conditions, will present all the obstacles to the orderly settlement of labor disputes described in the previous section of the brief. Even more importantly, the mere existence of such a rule, of wholly uncertain content and virtually unlimited potential breadth, has

[25] See footnote 22, *supra*, p. 29.

[25a] See footnote 9, *supra*, p. 9.

unsettling effects which are not easily dissipated. Under such a rule, any carrier engaged in a major dispute would always be offered the possibility, should a strike occur, of immediately obtaining some—though perhaps not all—of the comprehensive and long-range changes it may desire in its basic work rules. This prospect cannot help but detract from good-faith bargaining. Energies would, moreover, inevitably be directed on the part of the carrier in all cases to the prospects which the rule offers for ending any strike, not by compromise and good-faith negotiation as the Act requires, but by obtaining the ability, through abrogation of existing agreements, to run profitably despite the strike.

Nor can we ignore the fact that the court of appeals' principle necessarily commits to individual district judges the essentially discretionary decision as to what steps are economically "reasonably necessary" for a carrier to meet strike conditions. The rule, as the court of appeals candidly recognized, moves the judge "into the locomotive cab." 348 F. 2d at 686. It thus stands in direct conflict with the salutary and long-standing policy of federal labor legislation to remove the influence of judicial discretion and fiat from the settlement of labor disputes. *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 315–316.[26] The rule would also be likely to result in forum shopping by interstate carriers affected by strikes to find a favorably disposed judge to mete out *ad hoc*,

[26] The area into which the decision below would have the district courts intrude is one of "delicate and contemporaneous issues of policy" where "economic sympathies and pre-

and largely unreviewable, deviations from existing agreements.

We thus submit that the "reasonably necessary" rule of strike operation, no less than an unlimited exception for strike changes, constitutes a wholly unwarranted and seriously disruptive intrusion into the orderly system of labor-management relationships created by the Railway Labor Act. Such a rule should, in these circumstances, not be established unless it has clear historical roots within the railway industry as an implicit gloss upon the otherwise unqualified statutory language. We now show that such an understanding has never existed and that, moreover, no practical considerations justify according a carrier relief from its existing agreements in opposition to the clear terms of the Act.[27]

B. NO UNDERSTANDING IN THE RAILWAY OR AIRLINE INDUSTRIES SUPPORTS A "REASONABLY NECESSARY" EXCEPTION TO THE OBLIGATION TO ENFORCE EXISTING AGREEMENTS

Despite a significant number of strikes in the railway and airline industries since the inception of the Railway Labor Act, there is no evidence that a "rea-

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possessions [of individual district judges] may unwittingly foreclose the solution of these issues." Frankfurter and Greene, *The Labor Injunction* (1930) p. 132.

This is not to suggest the slightest criticism of Chief Judge Simpson, whose conduct of the many difficult proceedings arising out of this dispute has, as the Fifth Circuit stated (348 F. 2d at 686), been "distinguished." But few other district judges can be expected to be as conversant with the operations of the railroad involved in the case before them.

[27] To some extent, the court of appeals rested its decision here upon cases arising under the NLRA (See 336 F. 2d at 181). It is not accurate, however, to suppose that a right to deviate from *existing collective bargaining agreements* (the sit-

sonably necessary" exception to the Act's prohibitions upon unilateral employer action is required in order to permit operation during a strike. Indeed, such an exception has never before been urged by a carrier or court as being inherent in the Act. On the contrary,

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uation in this case)—as opposed to a right to change conditions not covered by existing union agreements—has been recognized under the NLRA. In fact, where deviation from existing working conditions have been permitted during a strike under the NLRA, the situations have uniformly been ones in which no collective bargaining agreements have existed between the union and the employer.

The extent to which an employer, in attempting to operate during a strike (See *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–346), can act unilaterally has not been fully delineated under the NLRA. On the one hand, it is clear that a strike does not suspend the employer's general obligation to bargain with the union (*National Labor Relations Board* v. *Peacheur Lozenge Co.*, 209 F. 2d 393, 403 (C.A. 2)), and therefore any unilateral action which is not reasonably necessary to maintain strike operations would be clearly unlawful. *National Labor Relations Board* v. *Tom Joyce Floors*, 353 F. 2d 768, 771–772 (C.A. 9). On the other hand, after a collective agreement covering the plant has terminated, the employer may, to some extent, establish the terms and conditions of employment of the replacements without consultation with the union. *Times Publishing Co.*, 72 NLRB 676, 684. There is, in addition, some *dictum* to the effect that the employer may *in this situation* perhaps even offer the replacements higher wages than he offered the union during negotiations, where this is a temporary measure and it is necessary to attract replacements. Compare *Pacific Gamble Robinson Co.* v. *National Labor Relations Board*, 186 F. 2d 106, 109 (C.A. 6), with *Tom Joyce Floors*, *supra*. The validity of such *dictum* is in doubt, in light of *National Labor Relations Board* v. *Katz*, 369 U.S. 736 and *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221. The employer may, to some extent, also unilaterally subcontract work for the duration of the strike where this violates no existing agreement. *Hawaii Meat Co.* v. *Na-*

carriers and the adjustment boards, which are the primary statutory agency for interpreting the effect of collective agreements, have uniformly assumed that collective bargaining agreements remain in full force during a strike, except for those provisions as to which changes have been proposed and fully nego-

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tional Labor Relations Board, 321 F. 2d 397 (C.A. 9), *Empire Terminal Warehouse Co.*, 151 NLRB No. 125, 58 LRRM 1589. On the other hand, this Court has expressly held that even a strike in violation of a no-strike clause of an existing agreement does not relieve the employer of his obligation to process grievances under the agreement. *Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247. Nor may the employer offer superseniority to replacements, even though this may be necessary in order to attract them, for this has effects which transcend the strike. *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221. The NLRA cases are thus wholly consistent with the proposition, which we urge, that the statutory duty to bargain can in no event be satisfied by an employer who asserts the right to violate an existing collective agreement. As this Court recently recognized, under the NLRA "the employer can institute unilaterally the working conditions he desires *once his contract with the union has expired.*" *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 316 (emphasis added).

At any rate, even if there were some basis for thinking that employers covered by the NLRA could depart from their existing agreements during a strike, this would not be persuasive authority for the "reasonably necessary" rule engrafted onto the Railway Labor Act in this case. Unlike the Railway Labor Act, the NLRA contains no explicit "status quo" provisions applicable during the operation of existing agreements, but only a generalized duty to bargain; there certainly is no provision in the NLRA comparable to Section 2, Seventh. Moreover, in industries subject to the NLRA, unlike industries under the Railway Labor Act, some coercive self-help is apparently available during the time that negotiations over a proposed change in conditions are proceeding. Compare *National Labor Relations Board* v. *Insurance Agents Int'l Union*, 361 U.S. 477, with *Manning* v. *American Airlines*, *supra*.

tiated with the unions, and that strike operations must conform to those agreements.[28]

In the railway industry, it has been highly unusual for a struck carrier to attempt to operate. The Annual Reports of the National Mediation Board for the period 1955–1964, for example, show that there were approximately 50 strikes during that period in which railroads did not operate and no strike of consequence where operation was attempted. This practice surely indicates a recognition that any strike operations would have to be undertaken pursuant to existing agreements. Any generally recognized right to operate on the carrier's terms, when the existing agreements made such operation unfeasible, would certainly have been exercised before this case.

While operation during a strike has not generally been attempted in the railway industry, it has occurred among airlines. In these instances, the operating carriers have, without apparent exception, assumed that their collective agreements remained in full force except for proposed changes which had been fully negotiated prior to the strike, and such agree-

[28] It is well settled that other "emergency" situations, such as bankruptcy, do not justify carriers in departing from existing rates of pay, rules and conditions; the strong congressional policy against unilateral action takes precedence over any plea of economic hardship by a railroad. *Burke* v. *Morphy*, 109 F. 2d 572 (C.A. 2), certiorari denied, 310 U.S. 635; cf. *In re Overseas Nat'l. Airways*, 238 F. Supp. 359 (E.D.N.Y.).

Indeed, in § 77(n) of the Bankruptcy Act, 11 U.S.C. 205(n), Congress provided:

"* * * No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in [sections 151 to 163 of Title 45], as amended June 21, 1934, or as [they] may be hereafter amended."

ments have governed strike operations. See, *e.g.*, *Western Air Lines* v. *Flight Engineers Int'l Ass'n*, 194 F. Supp. 908, 909 (S.D. Cal.); *Flight Engineers Int'l Ass'n* v. *Eastern Air Lines*, 208 F. Supp. 180, 190 (S.D.N.Y.), affirmed, 307 F. 2d 510 (C.A. 2), certiorari denied, 372 U.S. 945. In the former case, Western explicitly conceded the continuing effectiveness of its collective agreements during the strike and in the latter case, Eastern, while urging that negotiation and mediation had been completed with respect to changes it desired to make in reinstating operations, apparently did not urge that it could institute unilateral changes during strike conditions regardless of whether mediation had been completed.[29] Finally, numerous decision of the railroad adjustment boards which arbitrate "minor" disputes under the Act reflect the clear understanding that whenever strike operation is undertaken, it must conform with with existing collective agreements.[30]

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[29] In opposing the Flight Engineers' petition for a writ of certiorari, Eastern stated: "All three of the questions petitioner proposes * * * rest upon the false premise that the courts below held it unnecessary to exhaust the procedures of the Railway Labor Act before resorting to "self-help" in the form of either a strike or unilateral changes in working conditions. It is clear, however * * *, that the decision below fully recognizes this exhaustion requirement and finds it satisfied in the circumstances of this case." (Brief in Opp., Oct. Term, 1962, No. 776, pp. 4–5.

When Eastern resumed operations by replacing striking Flight Engineers with pilots, it informed the replacements that, both in the training period and during permanent employment as Flight Engineer, "you will be covered by the current standard Eastern Air Lines Flight Engineers terms and conditions, a copy of which is being furnished you." See Appendix to Appellant's Brief, C.A. 2, No. 29997 (1965), p. 87.

[30] For example, in *Brotherhood of Ry. & S.S. Clerks* v. *Macon, Dublin & Savannah R. Co.*, 98 N.R.A.B. (3d Div.) 730

In light of this industry understanding, and the total lack of evidence that a contrary rule is necessary to insure a fair economic balance in the railway and airline industries, we submit that the Court should not, at this time, impute an exception to the unqualified terms of the statute permitting "reasonably necessary" strike changes in order to "effectuate" a carrier's asserted right of "self-help." Contrary to the assumption of the court of appeals, it is plain that the only recognized "right to operate" during a strike (336 F. 2d at 181), is one which is subject to the provisions of existing collective bargaining agreements,

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(1961), the Board held that the carrier's action in furloughing some clerical employees during a two-month strike by the Trainmen's union (during which time the carrier did not operate), was taken in full accordance with the Reduction of Force Rule in the Clerks' agreement which is similar to Rule 19 of FEC's agreement with its Clerks. The Board said that such contract provisions had been construed consistently to give the carrier the right "to reduce forces by furloughing employees or abolishing positions during a strike *while railroad operations are practically suspended*" [emphasis added], but cautioned that, even during a strike, "the Carrier may not, under the pretense of abolishing positions, evade the application of an established rule." Thus, the Board held that the carrier had taken steps to counteract the strike *in full compliance with its agreements.* See, also, *Brotherhood of Maintenance of Way Employees* v. *Missouri Pac. R. Co.*, 48 NRAB (3d Div.) 583 (1950); *Brotherhood of Maintenance of Way Employees* v. *St. Louis Southwestern Ry. Co.*, 48 NRAB (3d Div.) 291 (1950). Also cf. *Brotherhood of Maintenance of Way Employees* v. *Atlanta and West Point R.*, 39 N.R.A.B. (3d Div.) 564, 569 (1948), holding that a lockout of maintenance employees during a one-day strike of engineers and firemen violated the agreement:

"We have often held that positions once established by a Carrier may not in the absence of agreement therefor, be abolished unless the work of the positions ceases to exist. In this case, however, we find the Carrier insisting that it had the right to abolish positions 'any time we see fit.'"

as modified only by changes which have been fully subjected to the statutory negotiation process. The balance, struck by Congress in favor of no unilateral changes in existing agreements, has been uniformly accepted throughout the railway and airline industries as applicable during strikes as well as at all other times. Any modification of the available economic weapons should come, if at all, though a legislative revision of the comprehensive provisions of the statute which now create that balance. Compare, *American Ship Bldg. Co.* v. *National Labor Relations Board,* 380 U.S. 300, 315–316.

C. NO PRACTICAL CONSIDERATIONS JUSTIFY THE ARROGATION OF EXISTING AGREEMENTS IN ORDER TO VINDICATE A "RIGHT TO OPERATE"

Finally, procedures explicitly set forth in the Railway Labor Act enable a carrier either wholly to avoid or to settle a strike on equitable terms or, where deemed necessary (contrary to general railroad industry practice), to make provision for strike operations, without in the least departing from existing agreements and the statutory duty to bargain.

(1) Sections 7, 8 and 9 of the Act (45 U.S.C. 157–159) contain detailed provisions relating to the binding arbitration of railway labor disputes by a board comprised of equal numbers of carrier, union and neutral representatives. The award of such a board, when filed in a district court, has the status of a judgment which "shall be final and conclusive on the parties." (Section 9, Second, 45 U.S.C. 159, Second).[31]

[31] Section 9, Third, 45 U.S.C. 159, Third, provides for limited judicial review of such awards.

These arbitration provisions may be invoked by agreement of both parties to the dispute (Section 7, First). Thus, in a case like this one, where the unions ultimately offered to submit the underlying wage dispute to binding arbitration (see Statement, *supra,* p. 6), the carrier could have invoked arbitration at any subsequent time. If FEC had thus agreed to arbitrate this dispute, the effect of this step would have been to require immediate cessation of the strike on the part of the unions, an obligation enforcible against the unions by injunction during the course of arbitration. *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.,* 353 U.S. 30. FEC might thus, at any time, have immediately resumed normal operations pursuant to its agreements by submitting to arbitration. Indeed, unless the unions withdraw their offer, it may still terminate the strike at any time by taking this step.

Moreover, relief would have been available to FEC here had it offered to submit the dispute to arbitration even if the unions had rejected that proposal. This Court has held, under Section 8 of the Norris-LaGuardia Act (29 U.S.C. 108),[32] that the failure of one party to a railway-labor dispute to submit the dispute to voluntary arbitration under Section 7 of the Railway Labor Act disables that party from subsequently seeking an injunction to enforce legal obligations connected with that dispute. *Brotherhood of*

[32] That Section provides: "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery or indication of voluntary arbitration."

R. Trainmen v. *Toledo P. & W. R. Co.*, 321 U.S. 50. In that case, under the terms of Section 8 of the Norris-LaGuardia Act, 29 U.S.C. 108, a carrier was denied an injunction against strike violence because it had previously refused the unions' request to submit the dispute underlying the strike to arbitration under Section 7. Thus a union, seeking to compel a carrier to abide by its existing collective agreements during the course of a strike over a major dispute, would similarly be vulnerable to the defense that it had previously refused an offer to arbitrate the dispute, and any injunction secured by the union in such circumstances would necessarily be conditioned upon the union's acquiescence in arbitration. See *Locomotive Engineers* v. *Missouri K. T. R.*, 363 U.S. 528, 531; also compare the majority and dissenting opinions in *Rutland Ry. Corp.* v. *Brotherhood of Locomotive Engineers,* 307 F. 2d 21, 39–40, 44–45 (C.A. 2), certiorari denied, 372 U.S. 954.

(2) A carrier desiring to operate during a strike may also affirmatively secure the right to take reasonable steps in response to the shortage of manpower and other emergency conditions which may be caused thereby by bargaining for the inclusion of appropriate provisions in the collective agreement. Such emergency provisions for strike conditions are not foreign to existing agreements. For example, the Record shows (Exh. Vol. 255) that in 1954 FEC bargained with the non-operating unions with regard to the notice to be given before furloughing (locking out) employees during listed emergencies, including strikes. FEC proposed that no advance notice be re-

quired, and it gained the right to abolish jobs upon 16 hours rather than upon the 7 days notice required previously. (See Rule 16, Agreement between FEC and Machinists, Boilermakers, etc., p. 27.)[33]

An important shortcoming of the court of appeals' "reasonably necessary" rule in this case, is that it does not thus reflect the bargained understanding between the parties regarding the rights of the carrier in response to a strike. The carrier is, instead, given the right to continue strike operations on favorable terms as a matter wholly outside its existing agreements. A carrier which has explicitly agreed not to take certain action during a strike, however, in return for a settlement with the union on other issues, should certainly not be free thus to deviate from that agreement when a strike occurs. And, in light of the industry-wide understanding pursuant to which struck carriers have not generally sought to reinstitute operations during the course of a lawful strike, it is most likely that existing agreements, which contain no such specific provisions governing strike operation, do, in fact, incorporate a mutual

[33] "Rules, agreements or practices, however established, that require more than sixteen hours advance notice before abolishing positions or making force reductions are hereby modified so as not to require more than sixteen hours such advance notice under emergency conditions such as flood, snow storm, hurricane, earthquake, fire or strike, provided the Carrier's operations are suspended in whole or in part and provided further that because of such emergency the work which would be performed by the incumbents of the positions to be abolished or the work which would be performed by the employees involved in the force reductions no longer exists or cannot be performed." (Exh. Vol. 255).

understanding that strike operation will not be attempted contrary to the terms of these agreements. There is no conceivable justification for upsetting this contractual understanding, as the "reasonably necessary" rule would do.[34]

(3) Even where collective bargaining agreements make no explicit provision for a strike situation, it may be open to a carrier to urge that limited departures from the literal terms of its agreements are permissible under a fair reading of these agreements. Without in any sense departing from the agreements, relief may thus be obtained under appropriate doctrines of contract interpretation applicable to abnormal conditions. For example, should the collective agreement require hiring to be done exclusively through a union hiring hall, and should the hall become inoperative during the strike, the carrier might well urge in that circumstance that hiring of replacements might take place on another basis which respected the essentials of the collective agreement.

Indeed, at least some of FEC's unions have shown a willingness to respect such conditions of impossibility. In the *Trainmen's* case, 336 F. 2d 172, it appears that the union conceded that its agreement with FEC did not completely preclude the use of supervisory personnel in

[34] Other legitimate means of preventive self-help also are open to carriers in the event of a strike. One means of considerable potential effectiveness would be an industry-wide strike insurance plan. See *Kennedy* v. *Long Island R. Co.*, 319 F. 2d 366 (C.A. 2), certiorari denied, 375 U.S. 830; *In the Matter of Mutual Aid Pact Investigation*, C.A.B. Order E–21044 (July 10, 1964); *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168, 170–173 (1959); Briggs, *The Mutual Aid Pact of the Airline Industry*, 19 Ind. & Lab. Rel. Rev. 3 (1965).

Additionally, in operating during a strike a carrier may of course institute any changes as to which mediation has pre-

some positions when other replacements were, in fact unavailable. Similarly, the government has never suggested that FEC would be totally foreclosed from making all changes in working rules or conditions during a strike, should such changes be asserted as proper under a fair reading of the contract. Such a contention that its changes were proper under the contract, however, is not made here by FEC. Should disagreement arise over the application of contract terms where such contentions are made by the carrier under the contract and rejected by the union, the Act provides a clear basis for an arbitrated settlement through invocation of the "minor" disputes procedure by the appropriate division of the National Railroad Adjustment Board.[35]

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viously been completed. Thus, the Fifth Circuit held that FEC could institute an entirely new set of rules for its Trainmen, see *Florida East Coast Ry. Co.* v. *Brotherhood of R. Trainmen*, *supra*, 336 F. 2d at 182. The carrier also may lock out employees in accordance with the reduction of force and furlough provisions typically found in contracts in the railroad industry. See Agreement between Florida East Coast Ry. Co. (Scott M. Loftin and Edward W. Lane, Trustees) and Brotherhood of Maintenance of Way Employees, Rule 32, as revised Dec. 1, 1959 (insert at pp. 26–27). *Brotherhood of Ry. & S.S. Clerks* v. *Macon, Dublin & Savannah R. Co.*, 98 N.R.A.B. (3d Div.) 730 (1961).

[35] Under Section 3, First (i) of the Act (45 U.S.C. 153, First (i)), the adjustment boards have power to resolve "[t]he dispute between an employee or group of employees and a carrier or carriers growing out of * * * the interpretation or application of agreements concerning rates of pay, rules, or working conditions." See, generally, *Elgin J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 724. Such power has been exercised by the Boards in disputes over the applicability of contracts in strike conditions. See, *e.g.*, *Brotherhood of Ry. S.S. Clerks* v. *Macon, Dublin & Savannah R. Co.*, 98 N.R.A.B. (3d Div.) 730 (1961); *Brotherhood of Maintenance of Way Employees*

In sum, neither practical nor historical considerations justify the creation of an exception to the unqualified provisions of the Railway Labor Act permitting "reasonably necessary" unilateral employer

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v. *Atlanta & West Point R.*, 39 N.R.A.B. (3d Div.) 564, 569 (1948). See, also, *Western Air Lines* v. *Flight Engineers Int'l Ass'n*, *supra*.

Alternatively, where the existing agreement has been reached through the mediation procedures of the Act, either party to such a dispute might invoke the power of the National Mediation Board to interpret the agreement under Section 5, Second of the Act (45 U.S.C. 155, Second) which provides that:

"In any case on which a controversy arises over the meaning or application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days."

The invocation of adjustment board jurisdiction, of course, cannot be used to subvert the Act's prohibition against unilateral changes when those changes are not authorized by existing agreements. Thus, when a carrier asserts the right to make changes, which seem to present a genuine question of contract interpretation, and where irrevocable injury will not be done by immediate implementation of the changes, the district court might stay proceedings to enjoin the particular changes proposed pending the decision of the adjustment board. See *Order of Ry. Conductors* v. *Pitney*, 326 U.S. 561, 566–567. On the other hand, where changes are proposed which do not appear to be legitimate under existing agreements, the proper procedure would be for the district court to maintain the *status quo* pending the determination of the adjustment board. The decision of the adjustment board, when rendered, would be subject to limited judicial review as specified in Section 3, First (p) of the Act (45 U.S.C. 153, First (p)).

deviations from existing collective bargaining agreements in strike conditions. Such an exception is asserted in this case for the first time and it is wholly unnecessary to vindicate a carrier's legitimate interests, which may be met within the framework of the Act as it is written. In light of the unsettling effect such an open-ended exception would potentially have upon the orderly administration of the fundamental requirement of the Act that disputes be settled, wherever possible, through peaceful joint negotiation, such an exception should not now be established for the first time. Indeed, a "reasonable necessary" exception would be especially inappropriate in this case, where the carrier's demands were not limited in any respect to "reasonably necessary" changes, but in fact asserted the total suspension of all existing agreements during the strike. For these reasons, the court of appeals' judgment should be affirmed insofar as it requires FEC to abide by its existing agreements during the course of a lawful strike, and should be reversed insofar as it permits "reasonably necessary" deviations from those agreements.

III

THE UNITED STATES HAS STANDING TO MAINTAIN AN ACTION TO ENJOIN VIOLATIONS OF THE RAILWAY LABOR ACT

The issue of the standing of the United States arises in this case because the action was originally commenced against FEC by the United States (R. 13–

16) and because the court of appeals treated the United States as the sole plaintiff in considering the appeal. The non-operating unions, however, were granted leave to intervene as additional plaintiffs in the district court, and they are petitioners in this Court (No. 750, O.T., 1965).

The unions did not file a separate notice of appeal in the court of appeals. Both FEC and the United States, however, filed cross-appeals which placed the entire judgment of the district court in issue (R. 225–226, 234). The unions, as plaintiffs below, were therefore parties to the court of appeals proceedings, and they participated fully in the litigation.

The court of appeals treated the issue of standing as necessary to its judgment, and the case was, in fact, originally instituted by the United States to vindicate its interest in securing enforcement of the Railway Labor Act in a situation where patent violations of the Act had posed a serious threat to commerce. It is clear that the United States does, in fact, have standing to take such action. For these reasons, we submit that the Court may appropriately resolve the question of standing in this case.

The present suit is a proceeding for the enforcement of Section 2, Seventh of the Railway Labor Act, prohibiting a carrier from making unilateral changes in existing wages, rules or working conditions without complying with the negotiation and mediation

procedures of the Act. Paragraph Tenth of that Section provides:

> The wilful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor * * *. *It shall be the duty of any United States attorney* to whom any duly designated representative of a carrier's employees may apply *to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section,* and for the punishment of all violations thereof * * * [emphasis added].

Such explicit authority in the United States to bring "all necessary proceedings" is not limited to criminal proceedings but also confers authority to seek injunctive relief. *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491–492. See, also, *Sanitary District* v. *United States*, 266 U.S. 405, 408; *United States* v. *San Jacinto Tin Co.*, 25 U.S. 273.[36] This is especially true where the regulatory provision sought to be enforced relates directly to maintaining the free flow of commerce (see Section 2 of the Act, 45 U.S.C. 152) an area of direct governmental responsibility.

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[36] Section 2, Tenth, was added to the Railway Labor Act in 1934. Commissioner Eastman, Federal Coordinator of Transportation, testified with regard to this provision, as follows: "* * * if any of the employees—and they are the ones vitally

The United States also has authority in this case to take proceedings to protect the jurisdiction of the National Mediation Board, which FEC has substantially frustrated through its refusal to submit to the statutory negotiation and mediation procedures which the Board supervises. "The United States may lawfully maintain suits in its own courts to prevent interference with the means it adopts to exercise its power of government and to carry into effect its policies." *United States* v. *Fitzgerald*, 201 Fed. 295, 296 (C.A. 8). See also, *United States* v. *American Bell Tel. Co.*, 128 U.S. 315, 367–368 (suit to protect integrity of patent

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interested in violations by carriers of these provisions—think that they are being violated they can present their claims without delay to the district attorney. He is required to take "all necessary proceedings for the enforcement of the provisions." If he finds that there is nothing in the case I assume he would not have to prosecute, but it places the enforcement of the provisions of this act directly with the Department of Justice and that is where I think that should be placed."

Hearings before House Committee on Interstate and Foreign Commerce on H.R. 7650, 73d Cong., 2d Sess. (1934), p. 54. See, also, *ibid.*, p. 28.

Moreover, in the discussion of Section 2, Tenth, during the House Hearings, *id.* at 55, 64–65, Section 3 of the Elkins Act (32 Stat. 847, 49 U.S.C. 43) was suggested as a precedent. That provision specifically authorizes the United States Attorneys, under the direction of the Attorney General, to bring civil injunction suits.

The suits the government instituted in this dispute against FEC and its unions to enforce the *status quo* (See also *United States* v. *Florida East Coast Ry. Co., et al.*, 221 F. Supp. 325 (D.D.C.); *United States* v. *Florida East Coast Ry. Co., et al.*, 55 LRRM 2802 (M.D. Fla.)), are the first actions, either civil or criminal, brought by the United States under the Railway Labor Act. Thus, there are no prior relevant interpretations of Section 2, Tenth.

system); *United States* v. *Feaster*, 330 F. 2d 671 (C.A. 5) (suit to enforce National Mediation Board's right to access to records needed to carry out its duties under Interstate Commerce Act); *United States* v. *Arlington County, Virginia*, 326 F. 2d 929 (C.A. 4) (suit to restrain collection of local tax which would contravene policies of the Soldiers' and Sailors' Relief Act of 1940).[37]

---

[37] The court of appeals in this case rested the standing of the United States upon the "substantial threat to the free flow of commerce" coerced by FEC's sweeping unilateral actions (348 F. 2d at 685). See *In re Debs*, 158 U.S. 564, 582–586; *United States* v. *City of Jackson, Mississippi*, 318 F. 2d 1 (C.A. 5), rehearing denied, 320 F. 2d 870; *United States* v. *Lassiter*, 203 F. Supp. 20 (W.D. La.) (alternate holding), affirmed, 371 U.S. 10; *United States* v. *U.S. Klans, Knights of Ku Klux Klan*, 194 F. Supp. 897 (M.D. Ala.). While we believe that FEC's conduct clearly contained that threat—and, indeed, that this dispute, which has interrupted commerce or railroad routes serving vital defense installations at Cape Kennedy and Merritt Island, Florida, has in fact been prolonged by FEC's unlawful conduct—the explicit provisions of the Railway Labor Act conferring standing upon the United States make it unnecessary, in our view, to consider this basis.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be (1) affirmed insofar as it enjoins FEC from making unilateral changes in the rates of pay, rules and working conditions in its existing agreements prior to the completion of the statutory mediation process, and (2) reversed insofar as it permits the making of such "reasonably necessary" unilateral changes prior to the termination of the statutory procedures.

Respectfully submitted.

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MARCH 1966.

APPENDIX

The Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. 151, *et seq.*, provides:

* * * * * * *

45 U.S.C. 151a. GENERAL PURPOSES.

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

* * * * *

45 U.S.C. 152. GENERAL DUTIES.

First. Duty of carriers and employees to settle disputes.

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives.

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * * *

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden.

No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

* * * * *

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections.

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. * * *

Tenth. Violations; prosecution and penalties.

The wilful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided,* That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off.

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this

chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

* * * * *

45 U.S.C. 153. NATIONAL RAILROAD ADJUSTMENT BOARD.

First. Establishment; composition; powers and duties; divisions; hearings and awards.

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

* * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * *

(*l*) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

* * * * *

45 U.S.C. 155. FUNCTIONS OF MEDIATION BOARD.

First. Disputes within jurisdiction of Mediation Board.

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. Interpretation of agreement.

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

* * * * *

45 U.S.C. 156. PROCEDURE IN CHANGING RATES OF PAY, RULES, AND WORKING CONDITIONS.

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

* * * * *

45 U.S.C. 160. EMERGENCY BOARD.

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute rose.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, a Corporation,
Petitioner

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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IN THE

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OCTOBER TERM, 1965

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, a Corporation,
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UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is printed in the Record (R. 903)* and is reported at 348 F.2d 682.

* The record printed for use in the Court below has been utilized by agreement of the parties. It consists of 3 volumes. Volumes I and II contain the transcript and the pages are numbered consecutively. Volume III contains Exhibit material and is independently paginated. References to Volumes I and II will be (R.); and references to Volume III will be (Ex.R.).

The Judgment of the Court of Appeals is at R. 911. The Findings of Fact and Conclusions of Law of the United States District Court for the Middle District of Florida are printed at R. 180 and are unofficially reported at 57 LRRM 2618. The preliminary injunction appealed by the Petitioner herein, Florida East Coast Railway Company (hereinafter "F.E.C." or "Railway") and by the United States (Petitioner in No. 782, O.T. 1965, which is consolidated for argument with the instant case and with No. 750, O.T. 1965) is at R. 189, and the Order of the United States District Court for the Middle District of Florida, denying in part and granting in part proposed employment practices is at R. 223.

A related opinion of the United States Court of Appeals (hereinafter referred to as the *Trainmen* case) is not printed in the record herein but is reported as *Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen*, 336 F.2d 172 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965), and is printed as Appendix C to the petition for certiorari of the United States in No. 782.

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1965 (R. 911). By orders entered on October 15, 1965 (R. 912) and November 18, 1965 (R. 913), Mr. Justice Black extended the time in which to file a petition for a writ of certiorari to and including November 29, 1965. The petition for a writ of certiorari was filed on November 29, 1965 and was granted on January 24, 1966 (R. 915). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The questions presented in this case are:

(1) While railroad labor organizations were engaged in a strike against a railroad after all procedures established by the Railway Labor Act had been exhausted by all parties concerned, did the Railway Labor Act compel the railroad to comply with collective bargaining agreements with the striking labor organizations in limitation of the right of the railroad to resort to self-help?

(2) Inasmuch as the National Railroad Adjustment Board was established by the Railway Labor Act as the forum for the adjudication of disputes arising out of the interpretation or application of collective bargaining agreements, did the courts below have jurisdiction (a) to require that the Railway comply with such agreements during the strike period, and (b) to determine disputes concerning the interpretation or application of such collective bargaining agreements?

(3) Does the United States of America have standing under the Railway Labor Act to obtain an injunction against a railroad when it does not allege the existence of any actual interference with, or obstruction to, interstate commerce and alleges no extraordinary circumstances which would justify injecting itself into the controversy?

Question (1) is essentially the same question as that presented by the Petition of the United States in No. 782. The difference is that, as phrased in the United States' petition, the question omits two crucial facts, *viz:* (1) that all parties concerned had exhausted all procedures established by the Railway Labor Act prior to the strike; and (2) that because of the strike it was

impossible for F.E.C. to maintain work rules and conditions which were set forth in collective bargaining agreements if it were to commence operations.

Thus, the basic issue posed is whether a struck carrier has the right to operate when it can operate only by deviating from collective bargaining agreements with the striking unions.

STATUTE INVOLVED

The Railway Labor Act, 45 U.S.C. §§ 151-163.

The text of the Railway Labor Act, Section 2. (1), (4), (5), First, and Seventh; Section 3. First (i); Section 5. First; and Section 6., being lengthy, is set out in the Appendix hereto.

STATEMENT OF THE CASE

This case arose out of demands made in 1961 upon F.E.C. by eleven cooperating labor organizations[1] (hereinafter called the "non-ops"), whose members were employed by F.E.C. (R. 181) (these unions are the petitioners in No. 750, O.T. 1965). All of the procedures established by the Railway Labor Act were exhausted by all parties, and, failing agreement, the members of the non-ops went out on strike. All other unions and all other non-supervisory and non-exempt employees honored the picket lines, as a result of which the F.E.C. was forced to cease operations (R. 394-96). Because it had no employees, except supervisors and exempt employees (hereafter referred to collectively as "supervisors"), F.E.C., when it resumed service on February 3, 1963, used supervisory and exempt employees to operate its trains (R. 353,

[1] These unions represent the so-called non-operating crafts—clerks, machinists, etc.

359). As a common carrier, the Railway had a duty to the public to provide service and F.E.C.'s purpose in resuming service was to fulfill their obligation (R. 325, 330, 382, 394). Without using supervisors, the first train could never have been operated, and their continued work as the Railway hired and trained new employees was essential (R. 204-08, 211-13, 359, 382, 384, 390, 394-95).

The United States challenges the Court of Appeals' holding that F.E.C. could—after obtaining the approval of the District Court—institute employment practices necessary to permit it to operate under strike conditions. The United States' position here is that the Railway Labor Act permits a struck carrier to operate only if it operates in strict and absolute compliance with all collective bargaining agreements, and that no "exceptions" are permissible unless, with respect to the strike-required "exceptions", the procedures of the Railway Labor Act are first exhausted. F.E.C., on the other hand, takes the position that the carrier's right of self-help in a strike situation is not an "exception", but clearly is within the contemplation of the Railway Labor Act, which does not apply to the temporary practices instituted during the period in which self-help may lawfully be employed.

Except for the strike which deprived it of the requisite trained personnel, F.E.C. would have continued to operate under the very same collective bargaining agreements from which the United States now says it may not depart. In short, the case involves a situation where an injunction was sought to compel compliance with agreements which F.E.C. was willing but unable to honor because of the refusal of its employees to work under those agreements. Thus, the Railway is in the strange position of being sued to enforce

agreements with which it was willing to comply and to reinstate working conditions which it did not voluntarily change, and which could not be duplicated under strike conditions.

Background

On September 1, 1961, the non-ops served a Section 6 notice demanding a wage increase of 25¢ per hour from F.E.C. and a requirement of six months advance notice from the Carrier prior to laying off or abolishing the positions of employees (R. 17-18, 181, Ex.R. 495-97).[2] Offers made by F.E.C. to settle the dispute were not accepted by the non-ops[3] and mediation by the National Mediation Board (hereafter NMB) did not result in a resolution of the dispute. The NMB's proffer of arbitration was refused by the non-ops and the NMB refused to recommend the creation of an emergency board (R. 18, 181, Ex.R. 457). Accordingly, the non-ops and their members went out on strike on January 23, 1963.

As stated, other labor organizations not involved in the dispute (i.e., the so-called operating unions, as well as some other non-operating unions) honored the strik-

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[2] The same wage demands were made against virtually all of the Class I carriers in the United States. Bargaining on a national basis, to which F.E.C. was never a party, resulted in settlement of the dispute in most cases.

[3] F.E.C. made a whole series of offers most of which involved hourly wage increases of more than the 10.28¢ per hour increase involved in the national settlement (see e.g., R. 339, Ex. R. 458, 477 and n. 6). At the time of the wage demand F.E.C. had suffered an extraordinary decline in its revenues as a result of the loss of traffic to and from Cuba and other traffic, and had been unable to meet fixed charges out of operating revenues for a number of years (Ex. R. 477-78). It sought, accordingly, to defer a portion of wage increase beyond 1962.

ing organizations' picket lines and F.E.C. ceased all operations. Thereafter, F.E.C. commenced trying to go back into operations.

The strike compelled the use of whatever manpower and skills were available, mostly from sources other than the membership of the labor organizations representing F.E.C. employees. As a result, various classes of work had to be consolidated and new personnel had to be trained. In the circumstances, rates of pay differed somewhat from the rates set forth in the agreements (R. 288, 293, 294, 354-59) in the sense that they were converted to a salary basis. In general, the rates paid were not less than the rates under the agreements (R. 357-58). The primary difference was that, because of the shortage of manpower, employees had to be worked across craft lines and seniority districts, and supervisors had to perform some of the work which would ordinarily have been performed by one or another of the crafts (R. 328-30, 359). Because of the lack of manpower, the F.E.C. could not, in resuming operations, comply with the collective bargaining agreements in effect before the strike.

In spite of a vigorous hiring program, it proved difficult for the Railway to obtain trained employees due to the strike. The Railway was compelled to hire relatively unskilled personnel to do skilled jobs, which necessitated lengthy on-the-job training of said employees by supervisory personnel, use of supervisory or exempt personnel to do the necessary work in the interim, and use of employees across craft lines (R. 661-62, 666-67, 672-74, 685-87, 702, 712-14, 723-24, 744, 753, 761-64, 775-86). This shortage of skilled personnel has persisted up to the present time.

During 1963, F.E.C. took several actions:

(1) on September 1, 1963, it reduced to writing the temporary practices which had grown up under strike conditions in a document entitled "Conditions of Employment" which was distributed to all employees and which was intended to be a guide to temporary conditions prevailing during the strike period (R. 288-302);

(2) on July 31, 1963, it issued a Section 6 Notice to eighteen labor organizations proposing cancellation of existing union shop agreements. The labor organizations, including the non-ops, refused to negotiate on August 29, 1963, and on September 9, 1963, F.E.C. notified the organizations that it was cancelling the union shop agreements because they had refused to negotiate (Ex.R. 381-84);

(3) on September 24, 1963, it issued a Section 6 Notice proposing adoption of a "Uniform Working Agreement" as an amendment to existing collective bargaining agreements (Ex.R. 36, *et seq.*). When the non-ops again refused to bargain or to confer with respect to this notice because of the presence of a court reporter, F.E.C. on October 30, 1963, attempted to put this notice into effect (Ex.R. 442, *et seq.*).

In the instant case, the District Court enjoined the implementation of the two notices (items (2) and (3) above) by F.E.C. *These two notices, which involved proposed permanent changes in the agreements, are no longer involved in this case and their propriety is not at issue before this Court.* The formalization of "Conditions of Employment" (item (1) above) was never intended as a change in the agreements, but

rather to reflect temporary conditions during the strike (R. 288-302).

Notwithstanding continuation of the strike, the District Court, with minor exceptions, ordered F.E.C. to comply fully with all collective bargaining agreements. This is the action which the Court of Appeals affirmed and which F.E.C. contests.

The Trainmen Case

Prior to the decision of the District Court in this case, the United States Court of Appeals for the Fifth Circuit, on August 18, 1964, decided the *Trainmen* case (*Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen*), 336 F.2d 172 (5th Cir. 1964), *cert. denied,* 379 U.S. 990 (1965). This decision has a bearing on the instant case. The *Trainmen* case involved, in part, the 1959 notice which was litigated in *Brotherhood of Locomotive Engineers et al.* v. *Baltimore & Ohio Railroad Co. et al.,* 372 U.S. 284 (1963) (hereafter the *B&O* case), and the full background of the 1959 rules dispute is set forth in that opinion and in the *Trainmen* opinion. With respect to the right of F.E.C. to operate during a strike, the Court of Appeals held:

> "Indeed, the unquestioned right to resort to self-help is the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration. . . .
>
> "Since the right surely exists, the law must accommodate itself to the exercise of this power in a way that will make it effectual. Brotherhood of Railroad Trainmen v. Chicago R. & I. R.R., 1957, 353 U.S. 30, 40, 77 S.Ct. 635, 1 L.Ed.2d 622. Anything less either temporizes with the so-far-determined policy against compulsory arbitration, or

puts the full weight of law on the side of the employees by making it impossible for the Railroad to carry on save on the terms and conditions imposed by the organized employees who now refuse to perform as agreed.

"To be sure, the law gives much power to organized labor. It discourages, on every hand, industrial and railroad labor strife, walkouts, lockouts, and strikes. But when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each. On the side of labor, it is the cherished right to strike. On management, the right to operate, or at least the right to try to operate." (336 F.2d at 181)

Concluding, the Court of Appeals held that F.E.C. was,

". . . free to institute and maintain such employment practices, etc. as are, and continue to be, reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions" (336 F.2d at 182)

The United States Case

This case began on April 30, 1964, when the United States filed suit against F.E.C., alleging that F.E.C. had violated Section 2, Seventh, and Section 6 of the Railway Labor Act. In essence, the complaint was that actions taken by the Railway immediately following the strike (e.g., the use of supervisory and exempt personnel) in its efforts to get back into operation were a violation of the Act. The position of the United States, insofar as is now material, was that such emergency operations constituted a unilateral change in the existing collective bargaining agreements without compliance with the statutory procedures, and that no deviation from the method of operations set forth in the agreements was permissible,

notwithstanding a strike.[4] F.E.C. took the position that during the strike the agreements were inoperative. It contended that it had the right, in self-help, to employ any peaceful means at its disposal in order to operate, and that the Railway Labor Act does not restrict a carrier subjected to a strike in the means used to operate under strike conditions (R. 100-103).

The courts below did not accept the contention of either party. In the preliminary injunction granted on October 30, 1964, F.E.C. was directed, *inter alia,* to reinstate and maintain the rates of pay, rules and working conditions contained in the collective bargaining agreements with the unions (R. 191). These agreements were thus held not to have been suspended by the strike. Further, the District Court provided that F.E.C. was enjoined from making any changes in employment conditions without *prior* permission of the Court, but was authorized to make application to the Court for permission to deviate from employment conditions specified by the agreements where necessary to enable F.E.C. to operate under strike conditions (R. 190-91). F.E.C. applied for permission to adopt certain employment practices (R. 216). This application was granted in part and denied in part on December 3, 1964 (R. 223). Although most of its requests were denied, F.E.C. was permitted to exceed the ratio of apprentices to journeymen set forth in the agreements, to contract out certain work, to use supervisory personnel to perform certain tasks for specified periods in which properly trained personnel were unavailable, and to use supervisory or contract personnel as bridge tenders as a matter of security (R. 223-25).

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[4] The complaint had numerous other allegations which are no longer material (R. 2, *et seq.*).

On appeal the United States contended that regardless of the strike and the impossibility of full compliance with the agreements, F.E.C. was nevertheless required to comply therewith because the Railway Labor Act forbids even temporary changes until the notice, bargaining and mediation procedures of the Act are exhausted. F.E.C. appealed, contending that during the strike the agreements had no force and that it could take any and all steps necessary to operate without advance court approval. It maintained that once Railway Labor Act procedures have been exhausted and there is a strike, the railroad is free to employ whatever means are at its disposal to operate. F.E.C. also contended that even assuming that the agreements remained in effect during the strike, exclusive, primary jurisdiction over claims of violation of agreements was in the National Railroad Adjustment Board.

SUMMARY OF ARGUMENT

The F.E.C. as a common carrier had a duty to provide service to the public even in the face of a strike, and it was not compelled or required during the period of the strike to operate in accordance with the working conditions, etc. set forth in collective bargaining agreements with the labor organizations representing its various employees. The temporary practices adopted by F.E.C. in response to the changed conditions created by the strike were not intended to be, and were not in fact, changes in the existing agreements requiring notice, bargaining or mediation, but were merely the only means available to F.E.C. to implement its right to try to operate.

In any event, the agreements with the labor organizations were suspended during the period of the strike

and F.E.C. was not required even to attempt to comply with them. After the procedures of the Railway Labor Act have been exhausted by all parties concerned and a strike has been called, the Act's procedures are inapplicable to temporary changes in operating practices adopted in response to strike conditions. The Act certainly does not compel compliance with collective bargaining agreements so long as the other parties refuse to perform as agreed.

The courts do not have jurisdiction to adjudicate disputes arising out of the interpretation and application of collective bargaining agreements. Exclusive, primary jurisdiction of such matters has been vested by the Railway Labor Act in the National Railroad Adjustment Board. Therefore, even if the Court below had jurisdiction to hold that agreements are not suspended during a strike (which F.E.C. denies), it was error for the Court to decree specific enforcement of the contracts and to empower the District Court to hear and determine matters of contract interpretation and application. The power thus granted to the District Court has its warrant neither in the Railway Labor Act nor in general equitable principles, and is totally without basis in law.

The United States has no standing to sue a carrier to require compliance with collective bargaining agreements during a strike where, as here, the flow of commerce was not interrupted. The Railway Labor Act does not provide for such a suit and no extraordinary circumstances entitle the United States to meddle in such a labor dispute.

ARGUMENT

POINT I

DURING A STRIKE CALLED BY RAILROAD LABOR ORGANIZATIONS AFTER EXHAUSTION OF RAILWAY LABOR ACT PROCEDURES, IN THE EXERCISE OF SELF-HELP A CARRIER IS FREE TO UTILIZE THE MANPOWER AND THE MEANS AT ITS DISPOSAL AND TO VARY FROM CONDITIONS EMBODIED IN COLLECTIVE BARGAINING AGREEMENTS IN ORDER TO OPERATE.

Prior to January 23, 1963, when the non-ops struck, F.E.C. regularly employed about 2,000 non-supervisory employees (R. 182) who were represented by 21 different labor organizations. Because all employees refused to cross picket lines, the strike by the non-ops on January 23, 1963, reduced F.E.C.'s complement of non-supervisory personnel to zero and F.E.C. ceased operations entirely. On February 3, 1963, F.E.C. in order to provide service to the public began to resume freight operations in a very limited manner using supervisors. In so doing, F.E.C. was following a practice which railroads faced with strike or other emergency conditions have followed without question for at least forty years.

No one contests the complete impossibility of hiring and training the necessary replacements. Indeed, as the courts below found, the labor shortage has continued to exist to a degree years after the strike began. See e.g., order of December 3, 1964, approving temporary employment practices (R. 223), which as modified is still in effect. We do not understand the United States to deny either the original or the continued impossibility of full compliance with the agreements. Rather, the United States' position is that after initiation of the strike, F.E.C. was not permitted under the Railway Labor Act to use supervisory personnel to get back into operation; that F.E.C. was compelled to

choose between yielding to all of the unions' demands or going out of business until it had recruited the number of trained skilled [5] employees sufficient to render compliance with every provision of the agreements possible.

Following this Court's decision in the *B&O* case, *supra,* the courts below acknowledged that the Railway Labor Act did not deprive the F.E.C. of the right to employ self-help. While F.E.C. contends that the courts below improperly restricted that right, the United States' contention is that it does not exist!

Accepting the United States' position literally would present an appalling situation. Even now, more than three years after the strike began, F.E.C. still would not have commenced operations unless in the meantime it had capitulated to the union demands. It would mean that, in the face of a refusal of its employees to report for work, any railroad carrier would be powerless to act.

The position of the United States is erroneous for at least three reasons. First, the claim of the United States necessarily denies the carrier the right of self-help during a strike, a right which this Court held was not taken away by the Railway Labor Act. Second, the provisions of the Railway Labor Act and its legislative history confirm that the Act does not impose restrictions upon the exercise of the right of self-help. Third, the collective bargaining agreements, the effec-

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[5] The required experience under the agreements for many of the skilled craftsmen is four years (R. 197, 750, 797-98). If such persons already trained are not available, F.E.C. must train the employees it has, on the job, and this presupposes its operating which the United States would halt.

tiveness of which during a strike is a fundamental premise of the Government's position, are in fact suspended and the carrier is free to proceed in the exercise of its right to self-help without reference thereto.

A. Following Exhaustion of the Procedures of the Railway Labor Act and Failure to Resolve the Dispute, the Parties Are Free To Utilize Self-Help.

In the *Trainmen* case, *supra*, the Court below relied upon this Court's decision in the *B&O* case and correctly stated that the Railway Labor Act permits both sides to a "major dispute" to resort to self-help once the Act's procedures have been exhausted:

> ". . . There is an actual strike against FEC by the non-operating Unions. The continuation of the strike by such employees is legal. So, too, is the effort of FEC to operate. But as a result of this strike, BRT declines to supply the craft workers as its contract calls for. So far as FEC's need for these crafts and BRT's failure to supply them, *there is no requirement or provision, for this impasse being resolved under the machinery of the Railway Labor Act. Nothing in the Act forces either compulsory arbitration or acquiescence. At that juncture, what the Act recognizes is that each party is free lawfully to employ self-help.*[6] The Supreme Court in this very controversy made that plain. In its decision of March 4, 1963, it stated:
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> > '. . . What is clear . . . is that both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute . . . .' " (336 F.2d at 180-81)

The United States, admitting that F.E.C. could not operate in compliance with the various agreements,

[6] Emphasis is supplied throughout unless otherwise indicated.

contends that before F.E.C. could attempt to operate after initiation of the strike by deviating from them in any way, was required to give notice, bargain and otherwise re-exhaust the procedures of the Railway Labor Act as to every temporary expedient required.[7] The labor organizations involved would not have consented to the emergency actions of F.E.C. in attempting to operate. Nevertheless, under the United States' theory, F.E.C., out of operation, lacking 2,000 employees necessary to fulfill the commitments of its collective bargaining agreements, should be required to re-exhaust all of the Railway Labor Act procedures, including mediation, seeking the consent to emergency working conditions of the very people who created the emergency by refusing to work in the first place! All will agree that in the circumstances which existed at the time of the strike and which continue to exist, such a course of action would have been futile and absurd.

The employers' right of self-help under the Railway Labor Act and the freedom of action it affords the carrier after that right matures has been confirmed by the courts. Thus, in *Pan American World Airways, Inc.* v. *Flight Engineers' International Ass'n, PAA Chapter*, 306 F.2d 840 (2d Cir. 1962), the Court upheld the right of the carrier unilaterally to take action during the strike in the exercise of its right of self-help:

> "When the cooling-off procedures of the Act, including the appointment and report of the Emergency Board, if resort is had to that procedure, are exhausted and the final thirty day period has

[7] The strike began because the unions wanted to change the existing agreements. The present litigation against F.E.C. instituted by the United States, is for the purpose of maintaining in effect the agreements which at the time of the strike F.E.C. did not wish changed.

> elapsed *it is quite clear that the Act contemplates that further progress toward the determination of the controversy will be left entirely to the interplay of economic forces without further governmental intervention. The parties are then free from all compulsion under the Act and may resort to 'self help'.* . . . The whole scheme of the Act is cast in terms of compulsory settlement of minor disputes and assistance through mediation (together with some resort, by appointment of Emergency Board, to the instruments of public pressure) in the *voluntary* [emphasis by the Court] settlement of major disputes, with a fixed cut-off date for the termination of such assistance, *and the relegation thereafter of the parties to the use of their economic weapons.*" (306 F.2d at 846)

This same philosophy prevailed in *Flight Engineers* v. *Eastern Air Lines*, 208 F. Supp. 182 (S.D.N.Y. 1962), *aff'd*, 307 F.2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963); *Flight Engineers* v. *Eastern Air Lines*, ... F. Supp. ...., 51 LRRM 2105 (S.D.N.Y. 1962), *aff'd*, 311 F.2d 745 (2d Cir. 1963), *cert. denied*, 373 U.S. 924 (1963); *Flight Engineers* v. *Eastern Air Lines*, 243 F. Supp. 701, 707, (S.D.N.Y. 1965) (pending on appeal).[8] See also, *Flight Engineers* v. *CAB*, 332 F. 2d

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[8] Flight Engineers (FEIA) was the authorized representative of the class or craft of flight engineers employed by Eastern and had a collective bargaining agreement. In 1960, FEIA served a Section 6 Notice of desire to change the agreement and Eastern served a Section 6 counterproposal. Negotiation, mediation and Presidental Emergency Board failed to bring about settlement and FEIA struck on June 23, 1962. Eastern at first ceased operations but in mid-July, 1962, resumed operations using pilots trained as engineers and returnee engineers, all pursuant to a new agreement with Air Line Pilots Association (ALPA). Action of Eastern held permissible exercise of self-help after exhaustion of procedures of the Act.

312 (D.C. Cir. 1964);[9] *Flight Engineers* v. *NMB*, 230 F. Supp. 611 (D.D.C. 1964), *aff'd*, 338 F.2d 280 (D.C. Cir. 1964).[10]

The Act's procedures are designed to maintain the flow of commerce while disputes concerning permanent changes in agreements relating to wages, rules, etc. are negotiated and mediated. As this Court stated in *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711, 725 (1945), with respect to major disputes:

> ". . . For their settlement the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. Section 5, First (b). *But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration.*"

And, as has already been noted, this Court's decision in the *B&O* case squarely determines that a carrier

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[9] FEIA filed a complaint with CAB claiming that Eastern had violated the Federal Aviation Act by virtue of its violation of the Railway Labor Act. Included were charges that Eastern bargained with individual engineers, negotiated with ALPA when legally obligated to bargain only with FEIA as to engineers, bad faith, etc. CAB dismissed the complaint. The Court of Appeals affirmed.

[10] Action by FEIA to enjoin a representation election being conducted by NMB in 1964. As the result of this election ALPA was certified (in 1964) as the representative of Eastern's Flight Engineers.

has the right to engage in self-help when the statutory procedures are exhausted (372 U.S. at 291).

In its assault upon the doctrine of employer self-help under the Railway Labor Act, the United States attempts to make it appear that the Act, unlike any other labor legislation ever passed by Congress, was intended to permit labor organizations to strike while hamstringing struck employers. The Court is asked by the United States to hold that a carrier, unlike any other employer in the nation, was intended to be compelled either to surrender to union demands or to cease operations by reason of a strike.

In decision after decision, this Court has upheld the doctrine of *mutual* self-help following exhaustion of statutory procedures. As the Court stated in *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477 (1960):

> "... The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side .... (361 U.S. at 489)

> ". . . There is little logic in assuming that because Congress was willing to allow employers to use self-help against union tactics, if they were willing to face the economic consequences of its use, it also impliedly declared these tactics unlawful as a matter of federal law." (361 U.S. at 495)

See also *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963); and recent decisions of the Court holding in various factual settings that a strike or other impasse permits the "legitimate use of any economic weapon by an employer": *NLRB* v. *Brown*, 380 U.S. 278, 286 (1965); *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1965) and *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965). Every court faced with this question has reached a like conclusion. For example, in *NLRB* v. *Abbott Publishing Co.*, 331 F.2d 209 (7th Cir. 1964), the Court, faced with the problem of a struck newspaper which contracted out work, stated:

> ". . . It would be a startling doctrine indeed if this court were to tell companies and employers faced with extinction because of a strike, that before they can make economic business decisions to contract out work in order to continue operations, they must first consult the union that caused the threat of extinction." (331 F.2d at 213)

To the same effect see *Hawaii Meat Co.* v. *NLRB*, 321 F.2d 397 (9th Cir. 1963).

Because it denies the existence of the railway's right to employ self-help, a right which this Court and every other court which has examined the question has confirmed, the contention of the United States herein should be decisively rejected.

B. During a Strike, the Railway Labor Act Does Not Impose Any Restrictions Upon Carrier's Use of Self-Help.

No provision of the Railway Labor Act mentions a strike. No hint is given that there are any statutory restrictions upon the use of self-help during a strike. No provision of the Act sets forth any restrictions to govern the activities of the employers or the labor organizations engaged in the strike. The silence of the Act in these respects was deliberate; it was never intended that the mediation and conciliation provisions of the Act having been once exhausted by the parties, were thereafter to be used to render either party's right of self-help nugatory. The Act thus recognizes the futility of re-mediation of a dispute once the voluntary system prescribed therein has failed to produce agreement.

The entire argument to the contrary rests upon the United States' interpretation of the language of Section 2, Seventh of the Act (45 U.S.C. §152, Seventh) which states:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."[11]

The United States would have Congress, by enacting this language in 1934, read as intending to prevent railroads from operating during a strike unless, by complete replacement of an entire work force, they are

[11] This provision replaced former Section 2, Fifth of the 1926 Act (44 Stat. 578 (1926)). The change in statutory wording had no effect whatsoever upon the basic statutory scheme. See, H.R. Rep. No. 1944, 73d Cong., 2d Sess. 2 (1934).

able to comply with all agreements with all organizations (or, alternatively, unless they first process all proposed temporary changes in operations, made necessary by the strike through the full panoply of Section 6 procedures). The United States' interpretation of the foregoing language is at war with the history of the statute and its first general purpose—

> " . . . (1) To avoid any interruption to commerce or to the operation of any carriers engaged therein . . . ." (45 U.S.C. § 151a(1))

The Act thus expressly recognizes that there is a greater public interest than the private interests of the antagonists in a labor dispute. That public interest is the continued flow of commerce.

As previously pointed out, the statutory language does not require the result the United States seeks or the limitation on F.E.C.'s rights which the courts below thought necessary. Section 2, Seventh in terms is a prohibition against a carrier *initiating changes* in conditions. It has no reference whatever to what a carrier can do when the conditions set forth in agreements were *already changed* by the unions when they struck. Moreover, temporary practices necessary to rectify the lack of manpower resulting from a strike do not themselves involve a "change . . . in agreements" as the phrase used in Section 2, Seventh of the Act specifies. Rather, such temporary practices are the essence of the right of self-help which comes into being once the procedures of the Act have been exhausted.

The theory of the Act, amply demonstrated by the testimony and debates which preceded its passage, was that its provisions would tend to stave off strikes

and interruptions of commerce; *and, that if its provisions did not accomplish this result, Congress might have to enact further legislation.* This view was voiced by the Committee Reports accompanying the bill; for example, the Report of the Senate Committee on Interstate Commerce advocated a "fair trial of the method of amicable adjustment agreed upon by the parties . . ." and continued:

> ". . . If the plan proposed by the parties does not work, it will then be proper to consider what other methods are essential to protect the public interest in adequate and uninterrupted transportation." (S. Rep. No. 222, 69th Cong., 1st Sess. 4 (1926))

The debate in Congress was to the same effect, the advocates of the bill prohesying, in the words of Senator Watson, Chairman of the Senate Committee on Interstate Commerce,

> ". . . that if this plan shall be adopted, no railroad labor strike will occur in the United States . . ." (67 Cong. Rec. 8819 (1926))

and other Congressmen, less sanguine, stating that if a "voluntary" plan did not work, Congress could easily remedy this by enacting a "compulsory" plan (67 Cong. Rec. 8896 (Senator Fess), 4570 (Congressman Rayburn), 4659 (Congressman Hawes), 4675 (Congressman Parker).

Thus, while it was hoped by Congress that the Act would put an end to all railroad strikes, it was understood that, under the plan of the Act, there was a point at which the compulsion of the Act ceased to be operative. After compliance with the Act, *both unions and*

employers were free of its restrictions to resort to self-help. As Congressman Crosser stated in debate:

> "If the emergency board fails to settle the dispute, *the railroads and the men,* if they are willing, may bring the dispute before a board of arbitration, *but they are not compelled to do so.*" (67 Cong. Rec. 4665 (1926))

The question before the Court here, is whether the Act created the restriction that a carrier must comply during strikes with all collective bargaining agreements, which the striking unions refused to perform, unless first excused from compliance by a court order.

In *Pan American World Airways, Inc.* v. *Flight Engineers' International Ass'n, PAA Chapter,* quoted *supra,* the Second Circuit answered the question this way:

> ". . . it is quite clear that the Act [the Railway Labor Act] contemplates that further progress toward the determination of the controversy will be left entirely to the interplay of economic forces without further governmental intervention." (306 F.2d at 846)

Judge Feinberg in one of the *Flight Engineers* cases, *supra,* 208 F. Supp at 190, had this to say in answer to the question:

> ". . . To allow a union but not an employer 'self-help' . . . is a possible but unattractive result, which stacks the deck heavily in favor of one of the parties to a labor dispute after a strike has started. I do not believe such a result is required by the Act."

No attempt was made to support, by reference to the statute or otherwise, the restrictions imposed on

F.E.C.'s use of self-help.[12] The decisions just quoted admit of no such limitations on F.E.C.'s right of self-help. It is submitted that there is no warrant in the Act for the one-sided restrictions imposed by the courts below.

Thus, the courts have held and the legislative history makes clear that the Railway Labor Act was never intended to prescribe rules of conduct for the parties to a labor dispute after the procedures for voluntary settlement were complied with and a strike had occurred. The Act simply does not cover the situation or compel action or non-action by either side during the strike.[13]

The Court is respectfully urged to reverse the decision of the Court below and to vindicate the right of F.E.C. during the strike to operate free of the necessity of compliance with its agreements with the striking labor organizations. Unless, contrary to all other Federal labor legislation, the Railway Labor Act was intended to place carriers at a fatal disadvantage as against the unions, a thesis which cannot be justified, no warrant for the one-sided limitations of the courts below on the employment of self-help by F.E.C. can be found.

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[12] In the *Trainmen* case the Court of Appeals merely said: "But this right of self-help is not a license for wholesale abrogation of the agreement. As the term implies, it is help which is reasonably needed to meet the impasse of a railroad desiring to run and unions unwilling to furnish workers." (336 F.2d at 181)

[13] This is not to say that the Act ceased to have any effect at all. F.E.C. concedes that *permanent* changes in agreements could not be made outside of the method specified by the Act, and that upon the cessation of the strike the force and effect of the agreements would be fully reinstated.

It should be remembered that the entire relief sought against F.E.C. in any of the litigation involved in this long dispute could have been obtained instantly by the unions calling off the strike. This would have compelled F.E.C. to revert completely to the working conditions embodied in the agreements as to which specific enforcement has been sought and required.

It is respectfully submitted that the Court should not sanction the attempt by the courts below and by the United States to buttress the economic position of the unions by restricting the F.E.C.'s right to employ self-help. See *American Ship Building Co.* v. *NLRB, supra,* 380 U.S. at 315-18.

C. The Courts Below Erred In Holding In Effect That the Collective Bargaining Agreements Were Enforceable Against F.E.C. During the Strike.

If, as this Court held in the *B&O* case, the carrier's right of self-help exists under the Railway Labor Act, the collective bargaining agreements with the striking unions must be temporarily suspended. Illogically, the courts below held that the right of self-help exists, but that these agreements were not suspended by the strike. They were, the courts below said, to be complied with *insofar as the F.E.C. was concerned, but of no effect insofar as the unions were concerned.* Only where it was completely impossible for F.E.C. to perform (although the F.E.C.'s performance was seriously interfered with by the unions) would the courts below even begin to relax the requirement of rigid compliance with the agreements.

F.E.C. submits that the holdings of the courts below are one-sided, lacking in all of the elements of mutuality which usually are important in a bi-lateral con-

tract, and, in final analysis, grossly unjust. Moreover, the determination below that these contracts were specifically enforceable against F.E.C., even though the union signatories had called a strike and flatly refused to honor the agreements, is extraordinarily bad law, and in conflict with every other precedent on the point.

The National Railroad Adjustment Board has consistently held that practices required by strike conditions do *not* represent the permanent "changes in rates of pay, rules or working conditions" to which Section 6 procedures are applicable under the Act, since it is the strike which "changes conditions" initially by withdrawing the labor force. The strike itself, the Board has held, opens the door to employer self-help and, although not nullifying collective bargaining agreements, places them for its duration in a state of "suspension".[14]

Although few cases involving the operation of strike-bound carriers under the Railway Labor Act have been

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[14] E.g., *Brotherhood of Railroad Trainmen and Kentucky and Indiana Terminal Railroad Company*, National Railroad Adjustment Board, First Division, Award No. 17,055 (1955); *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and Macon, Dublin & Savannah Railroad Company*, National Railroad Adjustment Board, Third Division, Award No. 10,197 (1961); *Brotherhood of Maintenance of Way Employees and St. Louis Southwestern Railway Company*, National Railroad Adjustment Board, Third Division, Award No. 5042 (1950); *Brotherhood of Maintenance of Way Employees and Missouri Pacific Railroad Company*, National Railroad Adjustment Board, Third Division, Award No. 5074 (1950); *Order of Railway Conductors and Boston and Maine Railroad*, National Railroad Adjustment Board, First Division, Award No. 13,341 (1950); *American Train Dispatchers Association and Spokane, Portland and Seattle Railway Company*, National Railroad Adjustment Board, Third Division, Award No. 9851 (1961).

decided by the courts, the cases (other than the instant case) in point hold squarely that after exhaustion of the Act's procedures, the collective bargaining agreements are not in force during a strike.

In *Flight Engineers* v. *Eastern Air Lines, supra,* 243 F. Supp. 701 (S.D.N.Y. 1965), the Flight Engineers brought an action against Eastern Air Lines and Air Line Pilots Association, claiming that certain actions of Eastern during a strike initiated by the Flight Engineers on June 23, 1962, violated the agreement between Eastern and the union. The Court replied:

> ". . . For the reasons cogently stated by Judge Feinberg and Judge Levet, *once the strike had been called and paralyzed the operations of Eastern, the agreement was no longer in force and Eastern was entitled to take unilateral action or self-help in order to restore the vital public service of its air line.* As stated by Judge Levet:
>
> > 'Based on the record before me, I find, for the same reasons as did Judge Feinberg, that as between the plaintiff [FEIA] and Eastern the procedures of the Act for the settlement of this dispute have been exhausted and that the parties were free to resort to self-help.'" (243 F. Supp. at 707)

With regard to alleged violations of seniority rights by Eastern during the strike, the Court held:

> ". . . *Since the agreement between Eastern and FEIA was no longer in force,* Eastern was under no obligation to reemploy all the strikers. . . ." (243 F. Supp. at 708)[15]

[15] An appeal in this case is pending before the United States Court of Appeals for the Second Circuit.

This conclusion is directly supported by the other cases cited *supra* arising out of the same airline strike (pp. 18-19, *supra*).

The Fifth Circuit Court of Appeals in the *Trainmen* case noted:

> "... there is no requirement, or provision, for this impasse being resolved under the machinery of the Railway Labor Act. Nothing in the Act forces either compulsory arbitration or acquiesence. At that juncture, what the Act recognizes is that *each party* is free lawfully to employ self-help." (336 F.2d at 180)[16]

In the *Trainmen* case the union conceded that F.E.C. had the right to meet strike conditions, and a similar concession was made in this case.

> "... the BRT has recognized that where, for example, sufficient crews are not available to maintain the contract structure forbidding road crews from operating trains through terminals, this requirement need not be met. They also concede that supervisory personnel may be used and that as respects the Union Shop agreement, it is not a violation of the agreement or of the Railway Labor Act for FEC to hire and pay nonunion replacements." (326 F.2d at 181)

It is to be noted that these concessions are in accordance with prior interpretation of the Railway Labor

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[16] As pointed out elsewhere, the correct inference from this proposition, which the Court of Appeals failed to draw, is that the employer may respond to strike conditions by using in its discretion, any mode of operation at its disposal. The idea that a carrier may make only changes which are "reasonably necessary" in the discretion of the District Court has no warrant in the Railway Labor Act, and the Court below erred in imposing this limitation on F.E.C.'s right to self-help during the strike.

Act, and in stark contrast to the extreme position taken by the United States.

The Court in the *Trainmen* case cited as a controlling authority this Court's unanimous decision in the *B&O* case, a decision whose mention has been assiduously avoided by the United States in prior briefs and in its petition for certiorari, since it so clearly upholds the carrier's right to self-help following exhaustion of mediation procedures under the Act. "What is clear . . ." this Court stated,

> " . . . is that *both parties,* having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute, subject only to the invocation of the provisions of §10 providing for the creation of an Emergency Board." (372 U.S. at 291)

The inescapable conclusion is that during the period of selp-help the agreements are suspended. How else can an employer deprived of the union labor force operate? Since a strike creates economic warfare, it is absurd to tie the hands of one of the parties as the courts below have done. Common sense dictates that the agreements are suspended as the Adjustment Board and the courts have consistently held.

For forty years the Railway Labor Act has been construed by everyone as permitting a carrier to meet a strike and to carry on business it can if it so desires. The decisions of the National Railroad Adjustment Board (see n. 14, *supra.*) in a variety of situations attest to this. To imply, as did the United States in its petition for certiorari (p. 14. n. 8), that carriers have always crumbled in the face of a strike or any other emergency is erroneous. For the first time since the

Act was passed, it is contended in this case that the intent of the Act is to prevent a carrier from operating during a strike.

Even the labor organizations involved, as has been set forth, have repeatedly conceded that F.E.C. was entitled to try to operate. Indeed in this case their counsel stated (the same counsel having represented the trainmen in the *Trainmen* case) that concessions made in the *Trainmen* case were not on the basis that F.E.C. was permitted to deviate from its agreements, but rather that the agreements did not require the maintenance of contract structure when there were not enough employees to do so. It was conceded that this was equally true under the non-op contracts. Why, unless no one ever thought otherwise, would the labor organizations with the most at stake have made these concessions? The answer as this Court held in the *B&O* case is that there is a *mutual* right of self-help available to both parties to the labor dispute when the procedures of the Railway Labor Act have been exhausted. This right F.E.C. was entitled to employ.

Inasmuch as the Railway Labor Act procedures were not applicable to the situation which confronted F.E.C., for all of the Act's procedures had been exhausted; and, since the collective bargaining agreements were in fact suspended during the strike, F.E.C. was free to employ self-help without the necessity of any compliance with the agreements. It is respectfully submitted that the decision of the Court below should be reversed for the foregoing reasons.

POINT II

PRIMARY JURISDICTION OVER QUESTION OF THE INTERPRETATION AND APPLICATION OF COLLECTIVE BARGAINING AGREEMENTS (ASSUMING ARGUENDO THAT THEY REMAIN IN EFFECT DURING A STRIKE) IS VESTED IN THE NATIONAL RAILROAD ADJUSTMENT BOARD. THE ORDERS OF THE COURTS BELOW ENFORCING COLLECTIVE BARGAINING AGREEMENTS AND COMPELLING F.E.C. TO APPLY TO THE DISTRICT COURT FOR APPROVAL OF TEMPORARY OPERATING PRACTICES INVADED THE BOARD'S PRIMARY JURISDICTION AND WERE WHOLLY WITHOUT BASIS IN LAW.

Section 3. First (i) of the Railway Labor Act (45 U.S.C. § 153 First (i)) commits the resolution of certain questions to the National Railroad Adjustment Board (NRAB) as follows:

> ". . . disputes between an employee or group of employees and a carrier or carriers growing out of grievances *or out of the interpretation or application of agreements* concerning rates of pay, rules, or working conditions . . . may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board . . . ."

In the tens of thousands, disputes of all kinds have been adjudicated by the NRAB since its formation in 1934. Day to day operations of all railroads create frequent questions and disputes concerning the "interpretation or application of collective bargaining agreements", from disputes involving the meaning of contractual language to those concerning the employer's use of "non-scope" employees to perform "scope" work in emergency situations. Personnel shortages and contract disputes occur in the course of normal operations on all railroads and are not necessarily related to strike conditions. When such disputes arise, they are referable not to the National

Mediation Board, and not to the courts, but to the NRAB, a body with expertise in the busines of running a railroad. *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, 243 (1950); *Order of Railway Conductors of America* v. *Southern R. Co.*, 339 U.S. 255 (1950).

F.E.C. has contended that the courts below never had jurisdiction to determine the applicability of the agreements during the strike because questions concerning the "application" of agreements are specifically committed to the jurisdiction of the NRAB. But, passing this point here, the Court below completely usurped the statutory jurisdiction of NRAB and made no effort to "make a workable allocation of business" between the court and the agency created by Congress to determine contract questions. *CAB* v. *Modern Air Transport*, 179 F.2d 622, 625 (2d Cir. 1950); Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037 (1964). Rather, that agency was here ignored and completely by-passed.

Having determined (albeit erroneously) that the collective bargaining agreements were not suspended during the strike, the courts below exhausted their jurisdiction. All further questions concerning the agreements were committed by the Railway Labor Act to the exclusive primary jurisdiction of the NRAB. In attempting to compel specific enforcement of the agreements by injunction (R. 191), the Court acted contrary to the express command of the Act. As the Court held in *Hettenbaugh* v. *Airline Pilots Ass'n International*, 189 F.2d 319 (5th Cir. 1951):

> "The Congress did not, by the Railway Labor Act, grant jurisdiction to the federal courts to afford relief for breaches of performance of col-

lective bargaining agreements. Appropriate quasi-judicial tribunals have been established for that purpose." (189 F.2d at 321)

The courts below clearly were without jurisdiction to decide the questions of contract interpretation and application presented by the carrier's operations during the strike period. This principle is firmly established that what a collective bargaining agreement permits a carrier to do or forbids it from doing under various circumstances is a matter within the exclusive province of the NRAB. See for example, *St. Louis, S.F. & T. Ry. Co.* v. *Railroad Yardmasters of America*, 328 F.2d 749 (5th Cir. 1964), *cert. denied*, 377 U.S. 980 (1964); *Aaxico Airlines, Inc.* v. *Air Lines Pilots Ass'n International*, 331 F.2d 433 (5th Cir. 1964), *cert. denied*, 379 U.S. 933 (1964), *rehearing denied*, 379 U.S. 985 (1965); *Elgin, J. & E. Ry. Co.*, v. *Burley*, 325 U.S. 711, 723 (1945); *Order of Ry. Conductors* v. *Pitney*, 326 U.S. 561, 565, 567-68 (1946), *rehearing denied*, 327 U.S. 814 (1946); *Slocum* v. *Delaware, L. & W. R. Co.*, *supra*; *Hettenbaugh* v. *Airline Pilots Ass'n International*, *supra*.

In language which has been quoted many times, this Court, in the *Burley* case, *supra*, distinguished between cases to which Section 6 procedures are applicable ("major disputes") and those in which the courts may not act so as to deprive the NRAB of jurisdiction ("minor disputes"):

"The first [class] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether

an existing agreement controls the controversy. *They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.*

> *"The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case."* (325 U.S. at 723)

A certain confusion may have crept into the opinions of the courts below because of the fact that F.E.C.'s Section 6 notices of July 31 and September 24, 1963, whose implementation was enjoined by the District Court and which are no longer in issue, obviously *did* attempt to change agreements. They involved major disputes and could not be handled by the NRAB. However, the injunction issued by the District Court on October 30, 1964 went further. It enjoined F.E.C. from making *"any"* permanent *or temporary* changes in employment conditions in existing contracts without prior authorization from the Court. It was intended to and did place solely in the hands of the District Court every question of interpretation and application of *existing agreements.*

As a result of affirmance of this Order by the Court below, the District Court is required to pass judgment on the day-to-day operating procedures of the railroad during the strike, which are not intended to and which do not in any way "change" agreements. In contradiction of its own decision in *Hettenbaugh* v.

Airline Pilots Ass'n International, supra (189 F.2d at 321), wherein it stated:

> "... The federal courts are not charged by federal law with the duty of policing parties in the performance of collective bargaining agreements entered into pursuant to the Railway Labor Act . . .",

and in contradiction of the decision of this Court in *Order of Ry. Conductors* v. *Pitney, supra,* the Court below has transformed the District Judge into just this sort of "policeman".

Of course, the District Court cannot decide whether a "deviation" from collective bargaining agreements is "reasonably necessary" or not until it has first decided whether the operating procedures proposed by the Railway are in fact in accordance with or in violation of agreements. When the District Court undertakes to police the agreements under the guise of affecting compliance with its order to reinstate and maintain agreements, by the very act of policing the agreements it displaces the primary and exclusive statutory jurisdiction of the NRAB. Thus, the determinations by the lower court inevitably involved questions of contract interpretation and application, and the District Court time and again has played precisely the same role that the statute gives to the NRAB. For example, it has decided:

> —that the language of Rule 46(b) 7 of the collective bargaining agreement with the Trainmen requires seasonal readvertisement of yardmen's jobs, even though the same language, as interpreted by the Railway, does not require such readvertisement if the active yardmen object thereto;[17]
>
> —that the language of Article 22(b) of the Trainmen agreement prohibits promotion of train-

men to conductor where there are no trainmen eligible for promotion thereunder (although the Article is silent on the question).[17]

—that the language of Articles 22(a) and 45(b) of the same agreement prohibit separate seniority as trainmen and as yardmen (in spite of past practice under these Articles to the contrary);[18]

—that engineers were improperly disqualified for service by F.E.C.'s chief medical examiner, even though it was shown that the standard applied, namely whether the employee was physically qualified to safely and efficiently perform his duties, was the same as it had been for more than 30 years. The court held that the fact that these disputes had been processed on the property as grievances and that F.E.C. had offered to submit these disputes to a neutral doctor for resolution was immaterial;[19]

—that conductors were improperly disqualified for service by F.E.C.'s chief medical examiner, even though the standard applied, as set forth above, was the same standard as followed for more than 30 years and most had gone to a neutral doctor pursuant to an agreement between F.E.C. and the Brotherhood of Railroad Trainmen. The Court held that time limits set forth in the collective bargaining agreement were immaterial;[20]

—in the instant case that the non-ops' agreements prohibit the general contracting out of work

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[17] Order On Rule To Show Cause, No. 64-40-CIV.-J, M. D. Fla., filed February 12, 1965.

[18] Order, No. 64-40-CIV.-J, M. D. Fla., filed February 15, 1965.

[19] Order, No. 64-239-CIV.-J, M. D. Fla., — F.Supp. —, 60 LRRM 2292 (1965).

[20] Order On Rule To Show Cause, No. 64-327-CIV.-J, M. D. Fla., filed February 28, 1966.

by the Railway even though the agreements are silent as to the contracting out of work and the Railway has always contracted out work when it did not have sufficient employees to do the work with its own forces; and

—in the instant case that F.E.C. is not permitted under the agreements to use supervisors to perform craftwork or to disregard temporarily craft or seniority district restrictions when sufficient personnel are not available to maintain contract structure even though the unions have repeatedly conceded that such practices do not violate the agreements.

Clearly the District Court is not the appropriate forum for the resolution of questions such as these. The proper forum for the resolution of such questions is the NRAB as this Court held in *Slocum* v. *Delaware, L. & W. R. Co., supra,* (339 U.S. at 243):

". . . The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. *The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon.* Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems."

A railroad labor organization which believes that a carrier is violating the collective bargaining agree-

ment during a strike (assuming the continuing vitality of the agreement) thus has *a complete and adequate remedy at law* before the body specially constituted to hear such complaints—the NRAB—and should not be permitted to invoke the equitable jurisdiction of the Federal courts.[21]

The fact that such infringement upon the exclusive jurisdiction of the NRAB is inevitable under the decision of the Court below illustrates a fundamental defect in its holding that the District Court should pass on whether proposed operating practices are "reasonably necessary" to keep the carrier in operation. The defect is this: there is no lawful authority for the exercise of such power by the District Court. It is a pure judicial invention whose ingeniousness may be admired but whose lack of basis in the statute is apparent.

If not founded on statute, the said authority must be based on the Court's general jurisdiction in equity. But, such general jurisdiction is not properly invoked in this case for the following reasons:

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[21] It must be thoroughly understood that the Railway is not asserting that, assuming the courts below properly ordered the reinstatement and maintenance of agreements during the strike, the District Court could not enforce its order if the Railway refused to reinstate and maintain its agreements. What the Railway does say is that disputes concerning the application and interpretation of those agreements are matters committed by the statute to the primary and exclusive jurisdiction of the NRAB and that the courts below had no jurisdiction to determine on the merits either whether the exceptions were to be permitted or whether, at least where a bona fide dispute was shown to exist, the application of the agreement by the Railway was right or wrong. This is precisely what the statute has specifically provided is reserved to the NRAB.

(1) The carrier's right to self-help after exhausting the Act's procedures is not a matter of equity, to be granted or withheld in the Court's discretion, but is a legal right whose exercise was contemplated by the Act itself.[22] It was not the intention of Congress in passing the Act to permit Federal courts, in their discretion, to limit the parties' right to self-help. See Point I., *supra,* pp. 14 *et seq.*

(2) Equitable relief is improperly granted where a complete and adequate remedy law exists, as it does in the instant case before the NRAB.

(3) In limiting the Railway's right to change operating conditions during a strike, the courts below have violated a basic principle of equity—mutuality. A court may not compel specific performance of a contract by one party when the other refuses to perform. As the Court of Appeals for the District of Columbia noted in *United Electrical, Radio & Machine Workers* v. *NLRB,* 223 F.2d 338 (D.C. Cir. 1955), *cert. denied,* 350 U.S. 981 (1956), *rehearing denied,* 351 U.S. 915 (1956):

> "It is general law that one party to a contract need not perform if the other party refuses in a material respect to do so. And that rule applies to labor contracts. . . . The walkout was a material breach . . . ." (223 F.2d at 341)

(4) In limiting the Railway's right to interpret and apply its agreements during a strike, subject to the right that any dispute growing out of its interpretation and application may under the agreements

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[22] The frequent characterization of the decision of the Court below as carving out an "exception" to the Act is thus entirely without merit.

and the statute be determined by the NRAB, the courts below have imposed on the Railway a limitation not imposed on any other carrier and in derogation of the statutory jurisdiction of the NRAB. The basic unfairness of permitting the District Court to supervise the operations of the strike-bound Railway, while permitting the striking labor organizations to conduct their strike and to disregard existing agreements with impunity, negates the idea that the courts have any general power in equity to prevent F.E.C. from operating as best it can during the strike.

Therefore, the decision of the Court below requiring F.E.C. to submit proposed changes in operations to the District Court in order to enable the Court to decide whether such changes are "reasonably necessary" to enable the railroad to operate during the strike is without basis in law, and merits reversal by this Honorable Court.

POINT III

THE UNITED STATES DOES NOT HAVE STANDING TO LITIGATE THE INSTANT CASE.

F.E.C. challenges the standing of the United States to litigate this case. The basic question posed is whether the United States should have the right to inject itself into any and all labor disputes which may arise under the Railway Labor Act, even though the flow of interstate commerce is not in fact interrupted. An inquiry into standing is particularly apropos when the position advanced by the United States is compared with the fundamental purpose of the Act—"To avoid any interruption to commence or to the operation of any carrier engaged therein . . . ." (45 U.S.C. § 151a (1)). The United States' claim, sustained by the Court below, that it has standing to litigate under the Com-

merce Clause of the United States Constitution (Article I, Section 8) ill accords with its position herein that failing capitulation of the carrier to the unions' demands, commerce must halt until the procedures of the Act are re-exhausted.

The United States contended in the Court below that it has a right of action under the Commerce Clause to intervene in a situation where the flow of interstate commerce is threatened. Upholding this claim, the Court below held that F.E.C.'s efforts to get back into operation, etc. were in fact a threat to the free flow of commerce (R. 908). The plain fact is that F.E.C.'s actions have never posed a "threat" to the flow of commerce and that a party's standing to litigate under the Commerce Clause may not be based upon hypothetical "threats", but must be founded on some substantial, actual breakdown of interstate commerce. *Re Debs*, 158 U.S. 564 (1895). Here, a major element of the case, the repeated claim and proof by the United States that F.E.C. was operating at virtually 100% of capacity,[23] belies the claimed threat. It demonstrates convincingly the fact that a threat to commerce was and is non-existent.[24] Unless a "threat" that the unions may be losing a strike is the equivalent of a "threat" to commerce, the United States has no standing herein.

Neither the temporary strike-required practices of F.E.C., which are the only matters now before the

[23] R. 148, 150, 250, 379-80, petition for certiorari p. 6 at n. 4; p. 18, n. 14.

[24] The District Court found that " . . . currently the railroad is carrying carload freight at a volume equal to or in excess of seasonally comparable pre-strike levels, and is handling all the freight traffic that is presented to it" (R. 182).

Court, nor F.E.C.'s attempted permanent changes pursuant to Section 6 notices, which are no longer involved, were a threat to or an interruption of commerce. In fact, F.E.C.'s actions were completely consistent with the intention of the Railway Labor Act to maintain the flow of commerce. The situation here was and is a far cry from the major calamity involved in *Re Debs, supra*, in which the United States was found to have standing to seek an injunction so as to prevent a substantial part of commerce from coming to a halt. F.E.C. submits that *Debs*, upon which the United States bases its alleged standing under the Commerce Clause, involved a special, extraordinary situation *in which commerce was in fact interrupted*, and that the determination of the Court in that case is not controlling here. Moreover, the alleged "threat" to commerce in future strike situations unrelated to this case, upon which the United States relies so heavily, is equally unconvincing as authority for its purported right to litigate herein. When and if situations such as those in *Debs* arise, it will then be appropriate to consider whether there is a legitimate interest of the Government of the United States to be protected which might give the United States the requisite standing to sue. No such interest is involved here.

The United States also claimed standing under the Railway Labor Act to enforce the Act and to protect the jurisdiction of the NMB. The Court below apparently sustained this claim (R. 908), in spite of the fact that the United States was unable to cite one example in which an alleged violation of the mediation and conciliation procedures of the Act was held to give the United States the right to bring a civil action

for its enforcement. Nowhere in the Railway Labor Act can there be found any indication that the United States stands in the wings of every labor dispute with the right to take the part of one or the other of the parties at any time. The labor organizations involved here were and are fully capable of protecting whatever rights the Act accords them and, in conjunction with the NMB, have been zealous in enforcing its provisions. The suggestion of the Court below that the provisions of the Act (45 U.S.C. § 152, Tenth) "seems to authorize this type of proceeding by the United States" (R. 908) is clearly erroneous. The provision relied upon sanctions only criminal prosecutions for violations of the Act and has never before been invoked by the United States in support of a claimed right to institute civil proceedings.

The Court is respectfully urged to reverse the determination of the Court below that the United States has standing to seek injunctive relief against F.E.C. in this case.

CONCLUSION

The decision of the Court below works a major change in the right of employers to utilize self-help when confronted with a strike. This decision, and even more, the contention advanced by the United States herein, would operate to place carriers in a position of far graver disadvantage vis-a-vis their labor organizations than that occupied by any other employer in the United States. It is submitted that such a result was never intended by the Railway Labor Act, and that only by doing violence to the Act itself and to national labor policy can either the position of the courts below or that of the United States be

sustained. No purpose which Congress sought to serve would be accomplished by this misreading of the Railway Labor Act, and, indeed, the decision of the Court below can only be regarded as ignoring the most basic features of that Act; namely, the essentially voluntary nature of the procedures used to settle "major disputes" and the commission of disputes concerning interpretation and application of collective bargaining agreements to a body of experts and not to the courts. Finally, it is submitted that it ill serves the function of the United States Government to choose sides in a labor dispute and cast its lot with one or the other of the adversaries. The United States should never have brought this suit, and this Court should determine that it lacked standing to do so.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals must be reversed.

Respectfully submitted,

WILLIAM B. DEVANEY

GEORGE B. MICKUM, III

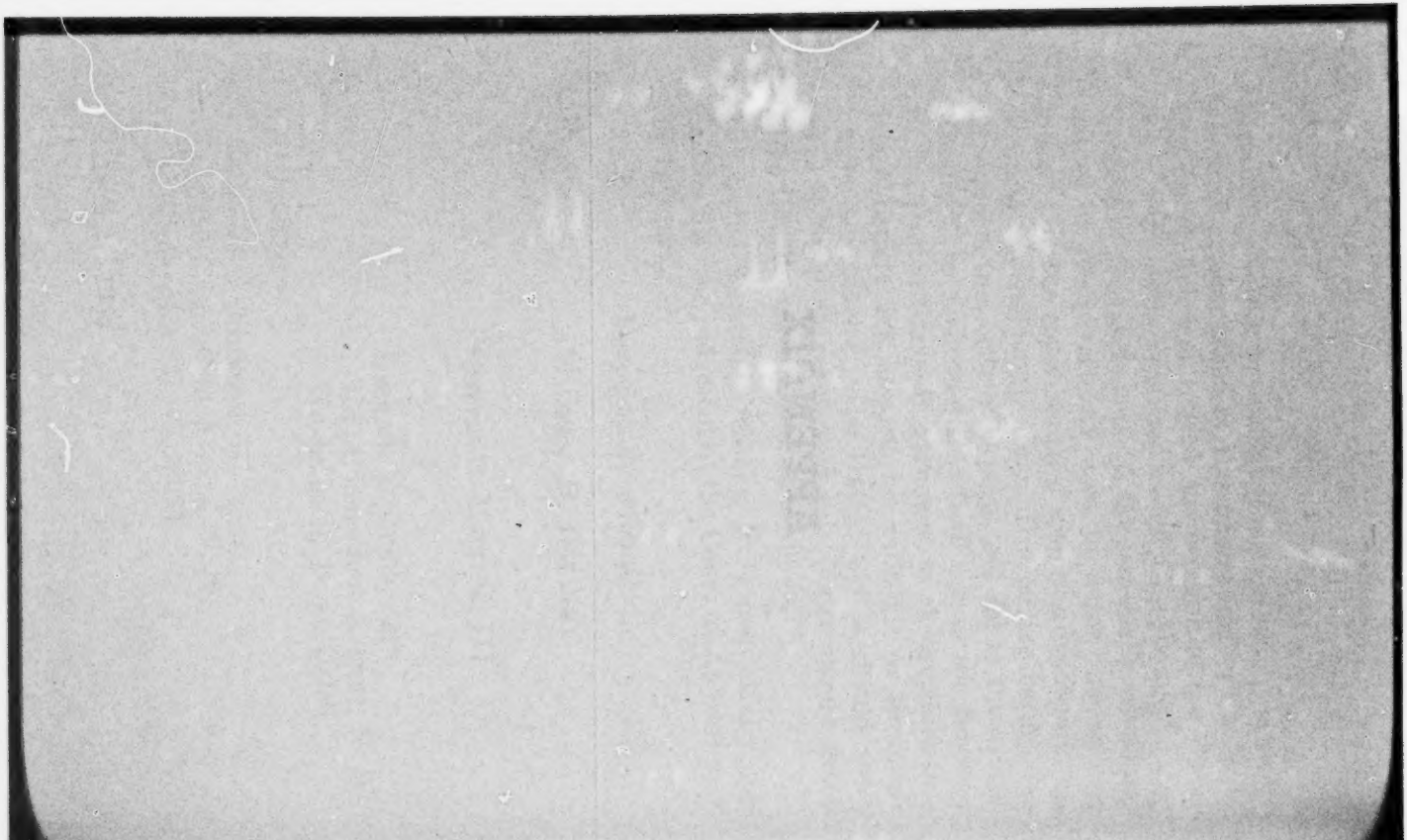
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March 21, 1966

APPENDIX



APPENDIX

Railway Labor Act, 45 U.S.C. §§ 151-163

Sec. 2. The purposes of the Act are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. (45 U.S.C. § 151a (1), (4), (5))

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof. (45 U.S.C. § 152, First)

. . .

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title. (45 U.S.C. § 152, Seventh)

Sec. 3. First. There is hereby established, a Board, to be known as the "National Railroad Adjustment Board," the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

. . .

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, in-

cluding cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes. (45 U.S.C. § 153, First (i))

Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes of rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Broad may proffer its services in case any labor emergency is found by it to exist at any time.

In either event, the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this Section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have

failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose. (45 U.S.C. § 155, First)

Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. (45 U.S.C. § 156)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, BROTHERHOOD OF RAILROAD AND STEAMSHIP CLERKS, FREIGHT HANDLERS AND EXPRESS AND STATION EMPLOYEES, ET AL.,

Petitioners,

No. 735 v.

FLORIDA EAST COAST RAILWAY COMPANY,

Respondent.

UNITED STATES OF AMERICA

Petitioner,

No. 736 v.

FLORIDA EAST COAST RAILWAY COMPANY,

Respondent.

FLORIDA EAST COAST RAILWAY COMPANY,

Petitioner,

No. 752 v.

UNITED STATES OF AMERICA

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF OF ASSOCIATION OF AMERICAN RAILROADS, AMICUS CURIAE, IN SUPPORT OF FLORIDA EAST COAST RAILWAY COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 750, 782, 783

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS AND STATION EMPLOYEES, et al.,
Petitioners,

No. 750 v.

FLORIDA EAST COAST RAILWAY COMPANY,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

No. 782 v.

FLORIDA EAST COAST RAILWAY COMPANY,
Respondent.

FLORIDA EAST COAST RAILWAY COMPANY,
Petitioner,

No. 783 v.

UNITED STATES OF AMERICA,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF ASSOCIATION OF AMERICAN RAILROADS, AMICUS CURIAE, IN SUPPORT OF FLORIDA EAST COAST RAILWAY COMPANY

As a preface to the arguments we believe must be made in reply to the contentions in the briefs of the gov-

ernment and the unions, we should like to point out to the Court two very important things:

First, the unions to the contrary notwithstanding, no one claims in this case that any provisions of the Railway Labor Act as such are suspended during a strike. See Brief for Petitioners in No. 750, 27, 28, 31, 33. Florida East Coast and the railroad industry contend that otherwise applicable collective bargaining agreements are suspended during strikes, and temporary changes in working conditions made necessary if operations are to be continued during strikes are not changes as to which the Railway Labor Act requires bargaining.

Second, the government to the contrary notwithstanding, the fundamental question in this case does not turn on the right of railroads to make changes in the form of Florida East Coast's "Conditions of Employment" and "Uniform Working Agreement." See Brief for the United States, 21. Those are merely labels which may obscure the real question—the right of Florida East Coast and other railroads similarly situated to make temporary changes in working conditions in order to try to operate under emergency situations created by strikes. The bulk of the changes made by Florida East Coast were instituted on February 3, 1963, when it first commenced operations after the strike called on January 23, 1963. *Florida East Coast Railway Co.* v. *Brotherhood of Railroad Trainmen,* 336 F.2d 172, 179 (5th Cir., 1964). These had no labels and it is the right of railroads to make such changes that is the focal point of this case.

I. The Literal Construction of the Railway Labor Act Advocated by the Government and the Unions Overlooks and Obscures the Fact that There is No Status Quo Provision Applicable During a Lawful Strike.

The principal basis of the case presented by the government and the unions rests on the literal language of Sections 2 Seventh, 5 First, 6, and 10 of the Railway Labor Act, 45 U.S.C. §§ 152 Seventh, 155 First, 156, 160, which impose a series of four successive *status quo* requirements on parties to major disputes being handled thereunder.

The essential error of this view is that, in the last analysis, it assumes its conclusion by inserting in the Act a fifth *status quo* requirement omitted by Congress. In the course of doing so, it ignores the signals actually pointing to the opposite conclusion—to the construction of the Act we and Florida East Coast urge.

There is no room for question but that the Act—as the government says at page 18 of its brief—contains four separate provisions directing that the parties to major disputes must maintain the *status quo*. Thus, Section 6 requires that the *status quo* not be disturbed during periods of face-to-face conference and negotiation therein directed. This is the first level at which preservation of the *status quo* is mandatory. Unless the National Mediation Board comes into the dispute, the *status quo* must be observed throughout the period of conferences and for 10 days thereafter. The second level at which the *status quo* is to be maintained is also provided in Section 6. It applies if and so long as the dispute is in the process of mediation under the auspices of the National Mediation Board.

The third *status quo* directive is provided by Section 5 First, as referred to in Section 6. As its final act if it is unable to effect a settlement agreement, the Mediation

Board is directed to proffer arbitration to the parties. If either side declines to arbitrate, the *status quo* must not be disturbed for 30 more days after notice from the Board of failure of its mediatory efforts, unless in the interim the parties do agree to arbitrate or an Emergency Board is appointed by the President under Section 10.

If an Emergency Board is appointed, the fourth and last *status quo* mandate comes into play—that provided by Section 10.* These Boards are directed to report to the President within 30 days of their creation, and the parties are required to maintain the *status quo* after such Boards are named and for 30 days following their reports.

At the last point—30 days after Emergency Board reports—the Railway Labor Act falls silent, and here is where the argument of the government and the unions fails. After very carefully specifying that the *status quo* must not be disturbed throughout the four principal steps for handling major disputes, expiring 30 days after reports of Emergency Boards, there are no further *status quo* requirements. In order to sustain their position, the government and the unions actually have no alternative but to assume that in the Act Congress intended there to be a further *status quo* restriction—a fifth one—applicable only to the railroads. They must indulge in this assumption because plainly the Act itself has no *status quo* provision continuing after 30 days from the dates of Emergency Board reports. They are here asking this Court not only to accept their assumption but to elevate it to the status of law.

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* If the parties agree to arbitrate under the provisions of Sections 7, 8, and 9 of the Act, 45 U.S.C. §§ 157, 158, 159, the threat to the *status quo* is, of course, automatically extinguished.

As we read the Act, its evident sense is squarely opposed to the assumption-argument of the government and the unions. After having specifically directed maintenance of the *status quo* at four separate levels of handling major disputes, Congress failed to direct that the *status quo* be observed beyond 30 days after Emergency Board reports. It certainly knew how to do so. The fact that under the circumstances it did not compels the conclusion that it did not mean the Act to have any such force after the fourth and final *status quo* requirement of Section 10.

The government, at pages 20-21 of its brief, concedes that there is a right of railroads to change conditions 30 days after Emergency Board reports, but it contends that this right is limited to making changes encompassed by the railroads' own proposals in the dispute in question. Not only is there no statutory warrant for this limitation, but it does not make sense. The government would have the unions free for the duration of the strike to reject not only the parts of the collective agreement directly involved in the dispute but, of necessity through their act of striking, the entire collective agreement as well. By the same token, the railroads must be free to treat collective agreements as suspended in their entirety by a strike.

The contention of the government and the unions that the Railway Labor Act requires railroads to bargain with the unions during a strike about the defensive measures it can utilize in exercise of its right of self-help is patently absurd. *National Labor Relations Board* v. *Abbott Publishing Co.*, 331 F.2d 209, 213 (7th Cir., 1964). It is no less unthinkable than the government and the unions would surely regard a rule that unions cannot strike without first processing demands that they be free to do so through the procedures of the Act. Congress adopted neither rule and this Court should so hold.

II. The Railway Labor Act Does Not Require Railroads to Bargain on Temporary Changes in Conditions Required to Meet Strike Emergencies—Pre-Strike Agreements do not Continue in Effect During a Strike.

The government asserts at p. 27 of its brief: "It is clear that the duty of a carrier to attempt to settle major disputes with representatives of the employees concerned is not suspended during a strike."

Taken at face value, we have no quarrel with this proposition—except that it introduces a serious element of confusion. The "major dispute" between Florida East Coast and the unions is that which precipitated the strike—over demands by the unions for wage rate increases and advance lay-off notices. We do not question that Florida East Coast has been under a continuing duty under the Railway Labor Act to bargain with the unions as to that dispute notwithstanding the strike.

This does not, however, mean—as the government assumes—that the railroad's right to make temporary changes in conditions to meet the strike emergency gives rise to a "major dispute" under the Railway Labor Act. That is the question of law presented to this Court. We contend, of course, that the law apart from the Act sanctions exercise of this right by the railroad and such exercise does not create a "major dispute" subject to bargaining under the Act.

In the same vein and on the same page of its brief, the government represents that: "It is . . . clear that employees who remain at work during a strike—regardless of whether they were pre-strike employees or are replacements and regardless of their union membership—are entitled to the benefits of any existing collective bargaining agreements covering the class or craft in which they work."

As far as this statement goes, we could not quarrel with it either because working employees are, of course, entitled to the benefit of any "existing collective bargaining agreements." But this begs the question whether pre-strike collective agreements continue as binding "existing collective bargaining agreements" during the strike. For all the reasons stated in our opening brief and this reply our position is that they do not. The government, on the other hand, claims that they do. In support, it advances footnote 20 on page 27 of its brief:

> "Thus, if a union called a strike against a carrier, and only half the union members went on strike, the carrier clearly could not deprive the nonstriking members or their replacements, of the benefits of wage and hour provisions in existing agreements, even by entering into individual agreements with employees. *J. I. Case Co.* v. *NLRB,* 321 U.S. 338; *Order of R. Telegraphers* v. *Ry. Express Agency,* 321 U.S. 342."

This is another example of spanning the gap from existing authority to new law by the bridge of assumption. It is anything but clear that a carrier could not deprive non-strikers or replacements for strikers of the benefits of pre-strike collective agreements, even by entering into individual agreements with employees. *J. I. Case Co.* v. *National Labor Relations Board,* 321 U.S. 332 (1944), and *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U.S. 342 (1944), cited by the government, are palpably inapposite. In neither case was a strike involved, so the Court was not confronted with any questions about rights of non-strikers or replacements under pre-strike collective agreements. Both cases settled no more than the rule that individual agreements cannot be used to defeat the duty to bargain collectively imposed by the National Labor Relations and the Railway Labor Acts nor to limit the terms of otherwise applicable collective agreements.

A case that is in point and which contradicts the government's assumption is *National Labor Relations Board* v. *Brown*, 380 U.S. 278 (1965). There this Court upheld the right of members of an employer's association not only to lock out their employees when only one employer was struck, but to continue to operate with replacements for regular employees who were willing to work. In other words, non-strikers were denied the benefits of collective agreements for the duration of the strike-lockout.

It is difficult to understand how a Congress that sanctioned the employer self-help upheld in *Brown* could be found to have restricted the self-help available to railroads to the extent urged by the government and the unions.

III. The Orderly Processes of Collective Bargaining Would Not Be Impaired by the Construction of the Act Advocated By Florida East Coast and the Railroad Industry.

The government and the unions express grave apprehension for the future of collective bargaining under the Railway Labor Act if it should be construed to approve railroads making temporary changes in working conditions in order to meet emergencies created by strikes.

That apprehension is baseless. As shown in Parts IV and V of this Reply, it has been the practice of railroads since before the turn of the Century to operate or attempt to operate notwithstanding strikes by employees and largely without regard to pre-strike collective agreements. That practice has continued unabated since enactment of the Railway Labor Act—and never questioned until now. At no time previously has this practice been thought to pose a threat to the objectives or policy of the Act. In this respect, the only comparatively unique feature of the case at bar is the relative degree of success of Florida East Coast in operating under strike conditions.

Analogous experience under the National Labor Relations Act similarly refutes the concern professed by the government and the unions. They appear to concede that employers subject to that Act are not bound by expired collective agreements during the course of a strike. And we take it that no one would dispute that the general practice of employers covered by the National Labor Relations Act is to try to run their businesses as best they can when confronted by strikes. But again we are aware of no claims that this has rendered ineffective the bargaining plan and scheme of that Act.

This means that the contention of the government that the rule contended for by Florida East Coast and the railroad industry would, if accepted, spell the end of meaningful collective bargaining under the Railway Labor Act is a makeweight argument that will not stand up. On the contrary, experience demonstrates conclusively that acceptance of the view of the law we urge would have no impact on bargaining under the Act as it has been conducted for 40 years.

IV. Contrary to Assertions of the Government, the General Practice of American Railroads Has Been to Operate or Try to Operate Notwithstanding Strikes.

In its brief, the government goes to some lengths to try to establish that it is not a matter of common practice for railroads to attempt to operate in the face of strikes. It attempts to overcome the absence of supporting authority by repeated assertions that such is a fact. Thus, at page 41 of its brief, it states:

> "In the railway industry, it has been highly unusual for a struck carrier to attempt to operate. The Annual Reports of the National Mediation Board for the

period 1955-1964, for example, show that there were approximately 50 strikes during that period in which railroads did not operate and no strike of consequence where operation was attempted. This practice surely indicates a recognition that any strike operations would have to be undertaken pursuant to existing agreements. . . .

"While operation during a strike has not generally been attempted in the railway industry, it has occurred among airlines. . . ."

At page 44, it says:

"Finally, procedures explicitly set forth in the Railway Labor Act enable a carrier either wholly to avoid or to settle a strike on equitable terms or, where deemed necessary (contrary to general railroad practice), to make provision for strike operations, without in the least departing from existing agreements and the statutory duty to bargain."

Finally, at pages 47-48 of its brief, the government, apparently having convinced itself of the existence of nonexistent practice and custom, says:

". . . And, in light of the industry-wide understanding pursuant to which carriers have not generally sought to reinstate operations during the course of a lawful strike, it is most likely that existing agreements, which contain no such specific provisions governing strike operation, do, in fact, incorporate a mutual understanding that strike operations will not be attempted contrary to the terms of these agreements."

We are delighted to see the propositions of law on which the government relies, depending on what it claims to be the accepted practice of the industry. When it realizes—as it soon must—that the practice is the opposite of what it claims before this Court, we trust it will not object to

our utilizing these same propositions incorporating what the practice really is.*

It is interesting to note that the only authorities the government can find to cite in support of its claim that the general practice of railroads is not to attempt to operate in the face of a strike are the Annual Reports of the National Mediation Board "for the period 1955-1964" (brief, 41)—and it does not accurately restate the relevant portions of those Reports. It says that these "show that

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* This effort to make black appear white inevitably involves the government in some curious contradictions. For example, after stating that it has been "highly unusual" for a struck carrier to attempt to operate (brief, 41), the claim is advanced on the very next page (brief, 42) that:

> " . . . [N]umerous decisions of the railroad adjustment boards . . . reflect the clear understanding that whenever strike operation is undertaken, it must conform with existing collective agreements."

While the Adjustment Board decisions do not at all support the conclusion for which the government cites them—as we will presently show—we cannot but wonder how, if it is "highly unusual" for struck carriers to operate, "numerous" Adjustment Board decisions involving rights during strike operations could have been generated.

Also, at page 48 of its brief, the government calls attention to the stipulation of the Brotherhood of Railroad Trainmen in the *Trainmen's* case, 336 F.2d at 181, to the effect that Florida East Coast would be free to use supervisors to man trains when regular or qualified replacement personnel were not available because of the strike. Why does it suppose that the Trainmen made such a stipulation? We submit that the organization was doing no more than conceding what the railroads have always been regarded as free to do. Significantly, however, neither the government nor the unions party to the case at bar have made any such concession. On the contrary, the rule of law they would have this Court read into the Railway Labor Act contradicts the concession of the Brotherhood of Railroad Trainmen.

there were approximately 50 strikes during that period in which railroads did not operate and no strike of consequence where operation was attempted." *Ibid.*

We invite the Court's attention to the Reports themselves. Starting with the Twenty-First Annual Report for the fiscal year ended June 30, 1955, and continuing through the Thirtieth Annual Report for the fiscal year ended June 30, 1964, the National Mediation Board reported on a total of 62 strikes. As a rule, it does not state whether the railroad involved in any given strike attempted to operate. But solely on the basis of the text of the Reports in question, the Board indicated rather clearly if not specifically that operations were not attempted in only 7 of the 62 strikes. In 3 others, the Board might be taken to have implied that operations ceased altogether. Therefore, it seems that the most one could possibly claim for these Reports is that they show that in 10 strikes out of 62—not 50 out of 62—the railroads did not try to render any service.

On the other hand, in 5 instances reported by the Board, it specifically observed that notwithstanding strikes the railroads involved continued to render full or partial service. Twenty-First Annual Report, 5-6; Twenty-Third Annual Report, 4; Twenty-Fifth Annual Report, 10; Twenty-Sixth Annual Report, 12; Thirtieth Annual Report, 12. And, in making these observations the Board indicated nothing to the effect that it regarded it as unusual for a carrier to attempt to operate during a strike. This plainly indicates that the Board has not perceived anything out of the ordinary in a carrier attempting to operate notwithstanding a strike.

Particularly startling is the government's assertion that the Reports in question show that during the period cov-

ered there was "no strike of consequence where operation was attempted." It overlooks not only the serious 60-day strike on the Louisville and Nashville System reported in the Twenty-Third Annual Report but also the Florida East Coast strike itself reported in the Twenty-Ninth and Thirtieth Annual Reports.

We doubt that the government would dismiss the Louisville and Nashville strike—which for 60 days impaired (but did not completely shut down) rail service provided by the system in 13 states—as one of no consequence. And, most assuredly, the Florida East Coast strike is a significant one. In both instances, the National Mediation Board reported that the railroads were maintaining at least partial service in spite of the strike.

It seems, therefore, that the government is a bit wide of the mark in asserting that the Reports to which it refers reveals "no strike of consequence where operation was attempted." The fact is that these Reports show that in the two longest strikes on major railroads reported operations were not only attempted but actually conducted. And in neither case did the National Mediation Board find justification for expression of surprise. It recognized the accepted custom and practice to be what we say it is—most railroads do try to maintain at least partial operations notwithstanding strikes.

This is not to say that all railroads are able in all strikes to resume even limited operations immediately. How quickly and to what extent operations can be restored by a particular railroad depends on whether the strike caught it by surprise, whether there was time in advance to lay plans for operating, and how long the strike lasts. As a rule, a work stoppage will result in a nearly complete cessation

of operations for a short time until supervisors can be moved into position to resume operations. Thereafter, as the strike continues, more and more of the regular operations can be restored with return of some employees who tire of the strike and hiring of replacements. The experience of Florida East Coast in the case at bar is a typical example of a railroad shut down completely for a short period but later restoring service to a continually increasing extent.

While we are confident that the Annual Reports of the National Mediation Board confirm the practice and custom we assert—and certainly they do not support that claimed by the government—it may be helpful to turn to other sources.

The government limits its review of history to the last ten years. Even that does not lend any support to its position, but if history is to be utilized in the process of ascertaining the intent of Congress in adopting the Railway Labor Act in 1926 and amending it in 1934, experience of the last decade is not very instructive. It is necessary to go back and uncover the picture as it was developed in the years before the Act was passed, as it appeared in the early 20's and 30's, and as it unfolded thereafter.

In 1886, shopmen unsuccessfully struck the Missouri Pacific. The railroad was able to maintain some service because many strikers elected to return to work and other men were hired to take the places of those who did not. Middleton, *Railways and Organized Labor* (Railway Business Association, 1941) 27. A strike against the Burlington in 1888 likewise failed to shut the road down. *Chicago, Burlington & Quincy R. Co.* v. *Burlington, C. R. & N. Ry. Co.*, 34 Fed. 481 (C.C. Iowa, 1888). The Toledo, Ann Arbor & Northern Michigan Railroad was struck in 1893, but

nonetheless operated some trains. See *Toledo, Ann Arbor & Northern Michigan Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730 (N.D. Ohio, 1893); *In re Lennon*, 166 U.S. 548 (1897). The Union Pacific undertook to operate in spite of a strike against it in 1902. *Union Pacific R. Co.* v. *Ruef*, 120 Fed. 102 (C.C. Neb., 1902).

The Pullman Strike of 1894 was probably the most important of its era. It too shows that at that time the practice of railroads was to try to operate even though their employees were striking. One of the claims for relief asserted against Eugene V. Debs and other officers of the American Railway Union was to restrain them from interfering with efforts to operate by the railroads using employees who did not want to strike and others who were willing to take the places of strikers. *In re Debs*, 158 U.S. 564, 586 (1895). Middleton, *supra*, 32-40.

Nowhere does the prevailing practice or custom of the time appear more clearly than in the 1894 Tenth Annual Report of the Commissioner of Labor entitled "Strikes and Lockouts." H.R. Doc. No. 339, 54th Cong., 1st Sess. (1894). It is a comprehensive two-volume report of strikes in all industries and trades, including railroads, for the 7½ year period from January 1, 1887 through June 30, 1894, divided by states and years. For each strike included, the report lists in columnar form many items of detail. One of these columns shows whether the operation against which a strike was called was "Closed" or "Not closed." Another is headed "Strikers reemployed or places filled by others." Railroad strikes are listed under the "Transportation" category. And, as in the case of strikes in different industries, the report makes clear the efforts of railroad managements of the time to continue to operate despite work stoppages.

The railroads were under federal control during and immediately after World War I from December 28, 1917, to March 1, 1920, when the Transportation Act of 1920 became law. Middleton, *supra*, 63, 66. Union membership increased significantly in these years under the policies of the federal Director General of Railroads. *Id.*, 63-64. But there were still some strikes. Even in these instances, however, the government itself undertook to maintain operations and these work stoppages were ended by return of the men or their replacement. *Id.*, 65.

The comparatively short life of Title III of the Transportation Act of 1920 as the blueprint for its time of statutory railroad labor law was marked, among other things, by the biggest nationwide rail work stoppage in history—the Shopcraft Strike of 1922. Jones, Railroad Wages And Labor Relations 1900-1952 (Bureau of Information of the Eastern Railways, 1953) 78-81. That the railroads tried and were able to maintain a certain level of operations in spite of the work stoppage is a matter of record. *Id.*, 79-80; see *State* v. *Personett*, 114 Kan. 680, 220 Pac. 520 (1923). That everyone in the federal government was well aware not only of the strike but of the railroads' operations in spite of it is also a matter of record. On August 18, 1922, President Harding appeared personally before a joint session of Congress to report the situation. 62 Cong. Rec. 11538 (1922). While the procedures of the Transportation Act were criticized, no charges were leveled against the railroads for operating in the face of the strike. On the contrary, the President took the strikers sharply to task for interfering with the efforts of the railroads to operate. *Id.*, 11539.

Dissatisfaction with Title III of the Transportation Act of 1920 led to enactment of the Railway Labor Act of 1926, which, as amended (principally in 1934), is the Act with which we are dealing today. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U.S. 30, 40 (1957). One of the principal innovations of this measure was its provision for investigation of major rail disputes by emergency boards appointed by the President—found in Section 10 of the Act. 45 U.S.C. § 160. The history of this provision sheds light on the understanding not only of the railroads and the principal unions, but also on that of the Congress which passed it. The unions were reluctant to agree to Section 10 and its emergency board provisions because they were apprehensive about its 60-day *status quo* requirement— they were concerned about being required to give two months' advance notice which would afford the railroads an opportunity "to prepare for the event." LECHT, EXPERIENCE UNDER RAILWAY LABOR LEGISLATION (Col. Univ. Press, 1955) 54. What bothered the unions, of course, was giving the railroads a chance to lay careful plans for operating should there be a strike. They knew what the general practice had been prior to that time and they expected it to continue. Congress, having then only recently witnessed the Shopcraft Strike of 1922, was likewise well aware of the practice and unquestionably expected it to continue absent some specific statutory prohibition—a prohibition which was not then enacted and never has been adopted since.

In the years immediately following the 1926 Act, labor disputes on the railroads were resolved peaceably, with very few resorts to strikes. First Annual Report of the National Mediation Board, 8. Even at this time, however,

the practice of the railroads of operating or attempting to operate under strike conditions was readily acknowledged by those in the field. Thus, in its Second Annual Report, the National Mediation Board noted at page 2, one strike in the period reported on. It observed that in this instance, " . . . [I]t was the employees who were impatient of mediatory efforts. Their hurried decision to strike has resulted in their displacement by new employees and they have been out of employment for many months."

Strikes did not become an important railroad problem again until after the close of World War II. Lecht, *supra*, 189.* A threatened strike at the end of 1943 resulted in a brief seizure of the railroads by the government from December 27, 1943, to January 18, 1944. Jones, *supra*, 125-127. A series of later disputes were all finally resolved. In several of the most important ones, strikes were again averted by seizure. This remedy was utilized from May 17 to May 26, 1946, May 10-July 9, 1948, and, most importantly, from August 27, 1950, to May 23, 1952. Jones, *supra*, 133, 134, 140, 149, 158.

Account should be taken of two actual strikes in these years which did not lead to seizure. The most significant was a 2-day nationwide strike called on May 23, 1946 by

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* There were a few strikes of present interest in the 30's and early 40's, however. The operating brotherhoods struck the Louisville and Arkansas Railway and the Louisville, Arkansas and Texas Railway on September 19, 1936, but the company announced that train service would continue on schedule. 101 Railway Age 459 (1936). The strike lasted until November 20, 1936. The Firemen struck the Monongahela Railway from April 30 to May 8, 1940, but train movements were continued throughout the strike at a level somewhat less than normal. 108 Railway Age 830 (1940). On December 28, 1941, the Firemen and the Trainmen struck the Toledo, Peoria and Western but supervisors were able to continue operations. 112 Railway Age 352, 425 (1942).

the Trainmen and the Engineers. A survey was later made of some 35 railroads to determine whether and to what extent they had continued operations during the work stoppage. Only 5 reported that they had been shut down. All the others had been able, by using supervisory personnel, to maintain some level of service. 120 Railway Age 1103-1113 (1946). The extent to which these railroads were able to provide service differed rather widely from one company to the next—as one would expect—but the significant thing is that most of the railroads involved tried and were able to operate to some degree.

The Firemen called a 6-day strike against the Pennsylvania, the Southern, the New York Central and the Santa Fe in May 1950. With the exception of the Pennsylvania, which was able to continue only emergency freight service, the railroads tried and were able to provide some passenger and freight service by use of supervisory personnel. 128 Railway Age 205 (1950).

We submit that this historical account decisively establishes that the general practice and custom of the industry is and always has been to operate or attempt to operate notwithstanding strikes. This was the history summed up in the testimony before the Presidential Railroad Commission in 1961 quoted at pages 20-21 of our opening brief. The incredible strike by the Brotherhood of Locomotive Firemen against 8 railroads confronting the nation as this is written confirms this practice—if confirmation be needed. Of the 8 struck railroads, 6 or 7 are continuing to provide such service as they can—the Pennsylvania, the Seaboard, the Illinois Central, the Missouri Pacific, the Central of Georgia, the Union Pacific, and perhaps the Grand Trunk Western. The Boston and Maine is apparently shut down and the Grand Trunk may be.

We know, of course, that times have changed since the 1880's, the beginning point of this historical account. But

the right to organize and bargain collectively and strike if necessary asserted by the unions is essentially the same today as it was in those early days. And, notwithstanding the fact that the ground rules of railroad labor relations have been refined through the years to the form in which they are presently expressed in the Railway Labor Act, the right of the railroads to resort to self-help by operating as best they can under strike conditions is likewise essentially the same as it has been through the years.

The basics of the Railway Labor Act were agreed to by the unions and the railroads. Their respective attorneys, working together, prepared the bill which was adopted by Congress as the Act of 1926. *California* v. *Taylor*, 353 U.S 553, 557-558 (1957). Both the unions and the railroads were fully cognizant of and never questioned but that the railroads would try to operate if and when their employees struck. Even more important perhaps is the fact we have previously noted that the Congress which approved the Act in 1926 had witnessed the Shopcraft Strike of 1922, during which the railroads had been able to operate—with varying degrees of success. If it had intended to curb or restrict this practice, we submit that it would have done so in such manner that there would be little or no question about it today. However, it did not do so in 1926 and has not done so since. It never intended the restriction which the unions and the government would now have this Court read into the Act.

On the basis of its erroneous assumption or assertion that railroads generally do not try to operate during strikes, the government contends (brief, 47-48) that collective agreements in the industry must be taken as incorporating a "mutual understanding that strike operations will not be attempted contrary to the terms of . . . agreements." With its assertion as to practice revised—as it must be—to reflect that railroads generally do try to

operate during strikes, we accept its view of the law corrected to reflect the true facts. This means that collective agreements in the industry must be read as incorporating a mutual understanding that strike operations will or may be undertaken without reference to the terms of collective agreements. This is an entirely acceptable legal theory endorsed by the government which may be taken as an alternative to the "suspended as a matter of law" theory outlined on page 25 of our opening brief.

V. The Government to the Contrary Notwithstanding, the Railroad Industry has Never Generally Assumed That Collective Agreements Continue in Force During a Strike.

Along with its repeated but erroneous assertions that railroads rarely attempt to operate under strike conditions, the government also flatly states that it is uniformly assumed in the industry that collective agreements remain in force during strikes. This is equally erroneous. At pages 40-41 of its brief, the government says:

> ". . . [C]arriers and the adjustment boards . . . have uniformly assumed that collective bargaining agreements remain in full force during a strike except for those provisions as to which changes have been proposed and fully negotiated with the unions, and that strike operations must conform to those agreements."

We regard it as significant that the only authorities cited for this proposition are a decision in a railroad bankruptcy case and the Bankruptcy Act itself. The utility of these sources escapes us except as a showing of the lengths to which the government must strain to find something—anything—to cite.

At page 42 of its brief, the government reports that:

> ". . . [N]umerous decisions of the railroad adjustment boards . . . reflect the clear understanding that whenever strike operation is undertaken, it must conform with existing collective agreements."

To sustain this representation, four Adjustment Board awards are referred to. The first cited is *Brotherhood of Railway Clerks* v. *Macon, Dublin & Savannah R. Co.*, 98 N.R.A.B. 730 (3d Div., 1961). It involved a claim by a clerk who was "furloughed" or laid off from May 1, 1956 to July 2, 1956 because of a strike by the Brotherhood of Railroad Trainmen. The basis of his claim was that while he was laid off his work was performed by one of the railroad's supervisory forces. He asserted that he was entitled to be paid because under allegedly applicable rules he should not have been furloughed if the work of his position remained.

The claim was denied.

Purporting to report the case, the government says:

> ". . . [T]he Board held that the carrier's action in furloughing some clerical employees during a two-month strike . . . was taken in full accordance with the Reduction of Force Rule in the Clerk's agreement which is similar to Rule 19 of FEC's agreement with its Clerks. The Board said that such contract provisions had been construed consistently to give the carrier the right 'to reduce forces by furloughing employees or abolishing positions during a strike *while railroad operations are practically suspended*' [emphasis added (by the government)], but cautioned that, even during a strike, 'the Carrier may not, under the pretense of abolishing positions, evade the application of an established rule.' Thus, the Board held that the carrier had taken steps to counteract the strike *in full compliance with its agreements.*"

The government therein represents that it quotes from two separate parts of the decision of the Board. An examination of the report of the case discloses, however, that neither expression quoted can be found in the decision of the Board. Both, in fact, are taken from the submission or brief of the railroad. The first—"to reduce forces . . ."

—appears at 98 N.R.A.B. at 738. The second—"the Carrier may not . . ."—is part of a prior award cited and quoted by the railroad. 98 N.R.A.B. at 739.

With respect to the "holding" of the case, in the quoted portion of its brief the government represents that the Board ruled that the carrier's action "was taken in full accordance with the Reduction of Force Rule in the Clerks' agreement which is similar to Rule 19 of the FEC's agreement with its Clerks. . . . [T]he Board held that the carrier had taken steps to counteract the strike *in full compliance with its agreements.*" (Emphasis the government's.)

The fact is the Board held no such thing.

The "Reduction of Force" Rule referred to by the government was, in the case in question, "Rule 14—Change in Force," quoted by the union in its submission. 98 N.R.A.B. at 733-734. This was the heart of the union's claim.

The actual decision of the Board, apart from routine mechanical recitals, takes up but a single 8-line paragraph in the report of the case. It appears in 98 N.R.A.B. at 741, and in its entirety reads as follows:

> "OPINION OF THE BOARD: There is a conflict in the record as to the amount of work involved in this claim however the amount of work performed by supervisors was nominal. *Rule 14 of the Agreement* [the "Reduction of Force" Rule referred to by the government] *has no application in this claim.* The Claimant's position was abolished and he was furloughed due to a Trainmen's strike during the period of this claim. *The Board finds that due to the Trainmen's strike that an emergency condition existed which justified the action taken by the Carrier during the period of claim.*" (Emphasis supplied.)

The disparity between the government's account of the decision and the actual ruling of the Board is such as to

render superfluous any additional observations on this score. We should like to point out, however, that applied to the case at bar this Award of the Adjustment Board means, as we here contend, that the emergency of a strike suspends the effectiveness of otherwise applicable collective agreements.

The second Adjustment Board decision cited by the government for the proposition that applicable agreements remain in effect during strikes (brief, 43, note) is *Brotherhood of Maintenance of Way Employees* v. *Missouri Pacific R. Co.*, 48 N.R.A.B. 583 (3d Div., 1950). That case involved a claim for time lost by non-striking maintenance of way workers who had been furloughed in anticipation of a strike by trainmen, enginemen, and yardmen. The strike actually took place and lasted a little more than a month.

Both the union and the railroad referred to a number of rules in the collective agreement claimed to support their respective positions. Not one of these rules specifically covered the rights of the railroad to furlough non-strikers when other employees struck.

The Board sustained the action of the carrier and denied the employees' claims. In so doing, it ruled that what had been done was in accordance with the agreement. The Board was able to rely on the agreement because it interpreted that document as including by necessary inference a right of all carriers to reduce forces under strike conditions. First, it noted that, "There is a presumption that action abolishing positions prior to settlement of a strike is bona fide." 48 N.R.A.B. at 605. Thereafter, the pertinent portion of its decision reads:

> ". . . [H]ere, as in all strike situations, we find the Carrier called upon to exercise its best managerial judgment in the face of a protracted and prolonged dispute with the operating personnel of its railroad. A

strike vote had been taken and a cessation of operations was inevitable. That the work stoppage would be of long duration reasonably could be foreseen, and later became an established fact. That the Carrier had a right to reduce forces by abolishing positions during a long drawn out strike while railroad operations were practically suspended is no longer an open question in this forum. . . .

"Having that right under its Agreement with the Organization, and the rules of construction promulgated by this Board, it is immaterial that there was no interruption of work covered by an independent contract. We are not here called upon to decide liability under another contract. . . ." 48 N.R.A.B. at 606.

In other words, the Board thus read into the collective agreement of non-strikers a rule—which might fairly be said to be a matter of the common law of the shop—to the effect that under the conditions of a strike emergency non-strikers can be laid off. The literal terms of the written collective agreement were put to one side in favor of this basic rule regarded as inherent in all such collective agreements. This is one way of restating the fundamental position of the railroad industry in the case at bar. That is—when some or all of their organized employees strike railroads have an inherent right not restricted in any way by the Railway Labor Act to operate as best they can under such temporary working conditions as are made necessary by the strike emergency and which are not otherwise unlawful.

The third Adjustment Board decision relied on by the government (brief, 43, note)—*Brotherhood of Maintenance of Way Employees* v. *St. Louis Southwestern Ry. Co.*, 48 N.R.A.B. 291 (3d Div., 1950)—is, with a single exception, the same as the second just reviewed. The exception is that it involved a claim by maintenance of way employees who had been laid off in anticipation of a threatened strike

which never materialized instead of in anticipation of a strike which later actually took place. The result, however, was the same—the action of the railroad was sustained. This means that the threat of a strike is sufficient to enable a railroad to take emergency measures to meet it.

The fourth and last Adjustment Board decision cited and relied on by the government (brief, 43, note) is *Brotherhood of Maintenance of Way Employees* v. *Atlanta and West Point Railroad,* 39 N.R.A.B. 564 (3d Div., 1948). It is an unusual case involving lay-offs during a one-day strike. The Board noted that the record was lacking information as to just what the carrier had done. 39 N.R.A.B. at 569. However, on the basis of the record as it stood, the Board found as a matter of fact that the work of the employees laid off had not ceased and, therefore, their lay-offs had been improper. The decision is not instructive on the matters before this Court in the case at bar.

This analysis discloses that the Adjustment Board decisions relied on by the government not only fail to sustain the proposition for which they are cited but actually support the contentions of Florida East Coast and the railroad industry.

The real basis for the assertion of the government here in question is demonstrably no more than another assumption. Its claim on page 41 of its brief that it is "highly unusual" for a railroad to attempt to operate under strike conditions is followed by this observation:

> " . . . This practice surely indicates a recognition that any strike operations would have to be undertaken pursuant to existing agreements."

In other words, the government assumes that operations under strike conditions are not attempted because it would

be so difficult to do so if existing agreements had to be complied with. We agree with the evident premise that strike operations of any consequence would be virtually impossible if pre-strike agreement conditions had to be maintained. But since we have shown—contrary to the government's claim—that it is not at all unusual for a railroad to attempt to operate as best it can under strike conditions, we can hardly agree that this reflects an understanding that pre-strike collective agreements remain in full force and effect during work stoppages. Instead, pursuing the same line of reasoning as the government, we conclude that the general practice of attempting to operate notwithstanding strikes demonstrates a settled understanding of railroads and unions alike that pre-strike agreement conditions are not applicable during work stoppages to striking crafts or to employees in crafts observing the picket lines of the strikers.

The actual practice permits of no other conclusion. If pre-strike agreements had to be observed during work stoppages, no supervisor could move the first passenger car or the first pound of freight and no unorganized employee could do the first piece of paperwork within the scope of the positions of strikers or others refusing to work.

VI. Decisions Under the National Labor Relations Act Announcing Federal Labor Policy Cannot be Distinguished.

Part V, E, pages 25-39, of our opening brief is devoted to a showing that the decision of the Court of Appeals in the case at bar is inconsistent with the federal labor policy enunciated by other Courts of Appeals and by this Court in cases arising under the National Labor Relations Act.

The government and the unions dispute the applicability of these decisions—although apparently not on the same grounds. Essentially, the unions' position, as stated at page 35 of their brief, is that "the whole scheme and policy" of the National Labor Relations and Railway Labor Acts are "irreconcilable and inconsistent." In reply, we need neither repeat nor expand upon the authorities to the contrary cited at pages 26-28 of our brief. Suffice it to say that it is well settled that the two acts are but different methods of implementing a generally uniform federal labor law policy.

The government takes a somewhat different tack, in its extensive footnote 27 at pages 38-40 of its brief. It seems to acknowledge—albeit grudgingly—a basic conflict of policy between the Court of Appeals in the case at bar and decisions under the National Labor Relations Act. At the same time, it is rather difficult to ascertain just what the government thinks the law under the National Labor Relations Act is. For example, on page 39 of its brief, it says:

> ". . . [W]here deviation from existing working conditions have been permitted during a strike under the NLRA, the situations have uniformly been ones in which no collective bargaining agreements have existed between the union and the employer." (Emphasis supplied.)

In this, the government seems to have overlooked *National Labor Relations Board* v. *Abbott Publishing Co.*, 331 F.2d 209 (7th Cir., 1964), *Pacific Gamble Robinson Co.* v. *National Labor Relations Board*, 186 F.2d 106 (6th Cir., 1950), *National Labor Relations Board* v. *Brown*, 380 U.S. 278 (1965), and *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300 (1965), in each

of which employer unilateral action in the face of a strike was approved and in each of which there had been a collective agreement prior to the strike. These cases are discussed at pages 30-37 of our brief.

Perhaps the government means to say that because prestrike collective agreements had expired in most of these cases they are to be distinguished from situations arising under the Railway Labor Act where the almost invariable practice of the parties (although in no way required by the Act) is to have "continuing" agreements effective until changed in accordance with the Act. But, as we have pointed out at page 26 of our brief, this is "a point of technical difference with no substantial legal distinction." Under our view of railroad labor law, "continuing" agreements common to the industry are suspended for any periods during which they are repudiated as charters for the employer-employee relationship by strikes of unions and employees they represent. As suspended agreements they are of no more legal effect than "expired" agreements.

One of the very recent cases cited by the government on page 39 of its brief is particularly significant—*National Labor Relations Board* v. *Tom Joyce Floors, Inc.*, 353 F.2d 768 (9th Cir., 1965). The Court of Appeals there ruled that under the circumstances of the record before it an employer failed to discharge its duty to bargain under Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act when it paid replacements for striking workers more than its last offer to the union representing the strikers. The government cites this case as authority for the proposition that ". . . [A]ny unilateral action which is not reasonably necessary to maintain strike operations would be clearly unlawful." By no stretch of the imagination, however, does the case stand for a rule that employers sub-

ject to the National Labor Relations Act have their hands tied by pre-strike conditions when they exercise their right of self-help. On the contrary, it points up clearly the very rule we are contending for here. The Ninth Circuit observed:

> "... The [Supreme] Court in *Katz* did indicate that there might be circumstances which the Board could or should accept as justifying unilateral action. ...
>
> "The wages paid the replacements by Joyce were greater than those offered during negotiations. *The company offered no evidence to the effect that the higher rate was necessary to secure replacements during the strike, or that for any other reason the higher rate was instituted as a temporary measure in response to an emergency situation created by the strike.* Moreover, most of the hiring of replacements at the higher rate occurred after Joyce refused to bargain about the hiring arrangement proposed by the union. 353 F.2d at 772. (Emphasis supplied.)

Thus, even though it ruled against the employer on the basis of the unique facts before it, the Court of Appeals squarely acknowledged that an employer subject to the National Labor Relations Act is free, when confronted by a strike, to take such temporary unilateral action as is necessitated by the emergency created by the strike. That really is all we are contending for the railroads under the Railway Labor Act in the case at bar.

Despite the recent date of this *Tom Joyce Floors* case, the government appears to be trying to cast some doubt on the soundness of that part quoted above "in light of" this Courts decisions in *National Labor Relations Board* v. *Katz*, 369 U.S. 736 (1962), and *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963). This doubt is just a smokescreen. The Ninth Circuit was not only aware of but, as indicated in the quote from its opinion, relied in part on

Katz while perceiving the *caveat* of *Erie Resistor*. To our minds, *Erie Resistor*, involving an employer effort to award superseniority to non-strikers to continue in effect after the conclusion of a strike, presents a very different problem from and is not relevant to temporary changes in conditions required to meet a strike emergency.

Packinghouse Workers v. *Needham Packing Co.*, 376 U.S. 247 (1964), cited at page 40 of the government's brief, is not in point. It simply stands for the proposition that the employer there had, by a very broad one-sided arbitration agreement, contracted away its unilateral right to discharge employees, even when they walk out in violation of a no-strike clause.

The remaining bases upon which the government would distinguish National Labor Relations Act authorities warrant no further comment than that at page 26 of our brief.

In this connection, we should perhaps make it clear that we are not here contending that the refinements of the labor law prescribed by the National Labor Relations Act in specific provisions interpreted and applied by the courts are likewise to be applied in the railroad labor field. All we are claiming is that the basic policies of the National Labor Relations and Railway Labor Acts are essentially the same. For present purposes, the policy with which we are principally concerned is that which leaves employers and unions free to the maximum extent not restricted by Congress in their resort to self-help when bargaining as prescribed by the Acts has failed to produce agreement. The decision of the Court of Appeals in the instant case is not in accord with that policy and should be reversed.

VII. CONCLUSION

The Court of Appeals has construed the Railway Labor Act so as to deprive the entire railroad industry of one of the most important aspects of its right to resort to self-help when its employees strike. This right—to operate or attempt to operate for the duration of a strike under temporary working conditions different from those specified in pre-strike collective agreements—has been exercised without question for generations. There is nothing in the Act to indicate directly or indirectly that Congress intended to limit or restrict this right. It is beyond the province of the courts to read such an intention into the Act and they should not do so.

The decision of the court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing reply brief has this day been served on each party to this case by mailing copies thereof to the respective counsel of record at their post office addresses as hereafter listed, air mail postage prepaid.

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OCTOBER TERM, 1965

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, ET AL., *Petitioners*

v.

FLORIDA EAST COAST RAILWAY COMPANY

UNITED STATES OF AMERICA, *Petitioner*

v.

FLORIDA EAST COAST RAILWAY COMPANY

FLORIDA EAST COAST RAILWAY COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

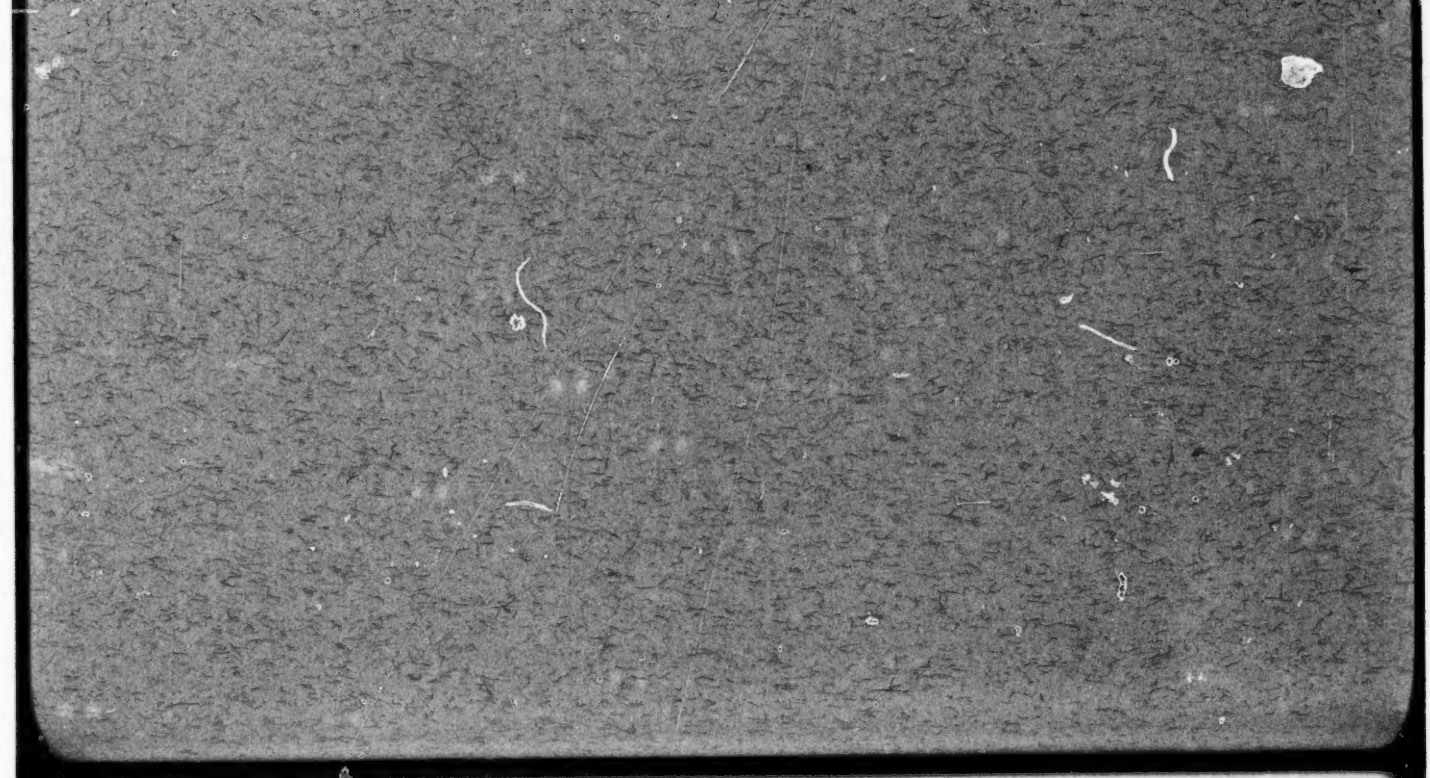
REPLY BRIEF OF FLORIDA EAST COAST RAILWAY COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 750

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, ET AL., *Petitioners*

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 782

UNITED STATES OF AMERICA, *Petitioner*

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF FLORIDA EAST COAST RAILWAY COMPANY

INTRODUCTION

In the short time available, all of the factual misstatements and exaggerations in the briefs of those

opposed to the F.E.C. cannot be answered in detail. Some of the more flagrant of these we shall attempt hereinafter to correct.

The villainous caricature of the F.E.C. and its management which the United States and the Unions attempt to draw, quite apart from its untruthfulness, has nothing to do with the legal issues before the Court, for the decision here will define the rights of any rail or air carrier seeking to operate during a strike. The issue before this Court is whether a rail or air carrier may try to operate in the face of a strike. It is the Railway's position that in the performance of its duty as a common carrier to render service, once the strike began it was entitled to resort to self-help—to operate with any work force available.

The argument that the statute requires F.E.C. to comply with every provision of every agreement during a strike as a prerequisite to operating rests upon a misreading of the statute, allegedly supported by an assumed industry practice, *viz,* that rail carriers have rarely tried to operate during a strike and, accordingly, that the language of the Act was intended to reflect this practice by making it impossible for a carrier to operate at all when struck unless able to comply completely with its collective bargaining agreements. The Unions make no such claim as to the industry practice; in fact they conceded that F.E.C. was entitled to try to operate and that their agreements did not require the maintenance of contract structure when there were insufficient employees to do so. Actual industry practice is and has always been diametrically opposed to the United States' assumption.

The United States and the Unions contend further that the Act is intended to preclude carriers from using self-help to defeat a strike and that, except as to particular amendments to agreements which have cleared the mediation process, a carrier is bound to adhere inflexibly to all other provisions of the agreements even though the strike has changed working conditions completely. The contentions of the United States and the Unions are erroneous and flatly at odds with the purposes of the Railway Labor Act.

The United States goes far toward conceding the proposition advanced by F.E.C. that if the agreements are not suspended during a strike the National Railroad Adjustment Board has exclusive jurisdiction to apply and enforce them. The United States apparently does not recognize the implications of this concession; to wit, that the District Court was without jurisdiction to enjoin alleged violations of collective bargaining agreements or to require the Railway to apply for approval of "reasonably necessary" employment practices.

ARGUMENT

I. THE RAILWAY LABOR ACT IS NOT INTENDED TO BOLSTER OR RESTRICT THE BARGAINING POSITION OF ONE OF THE PARTIES TO A LABOR DISPUTE.

Candidly (albeit erroneously) the Unions' brief (U. br.) sets forth the claim that the Railway Labor Act was intended to make it difficult if not impossible for a carrier to defeat a strike by continuing to operate (U. br. pp. 41-44). This is a fundamental premise of their position. They complain that the "carrier's 'right of operation' . . . [will] render ineffectual the workers' 'cherished right to strike'" (U. br. p. 43). "For, if the carrier has a federally protected right 'to

run * * * under strike conditions', then the whole idea of striking is rendered sterile" (U. Br. p. 44).[1] They ask, therefore, for a decision that in effect guarantees the success of a strike by restricting the F.E.C.'s efforts to restore operations to strict compliance with agreements, every provision of which was ignored by both the strikers and by those who refused to cross picket lines.

The same contention is fundamental to the United States' position. Thus, in its brief (U.S. br.) it argues that the F.E.C. took advantage of the strike over a wage dispute "to make immediate sweeping changes in its work-rules to permit operation on favorable terms" (U.S. br. p. 29). It argues in this vein at length (U.S. br. pp. 25-33) referring repeatedly to the fact that in the years following the first year of the strike when it operated at a loss, F.E.C. was able to earn a profit (U.S. br. pp. 8, 9 n. 9, 29, 30, 36).

Seeking to bolster the argument that a carrier (as distinguished from other employers) should not be allowed the full use of economic weapons to overcome a strike, the United States and the Unions contend that F.E.C. could have operated at 50% of its capacity, arguing that at that level of operations F.E.C. would be more amenable to settling the strike. The record references as to F.E.C.'s claimed ability to operate at 50% capacity under the agreements are to testimony given on May 26, 1964, *more than sixteen months after*

[1] Just where this "federally protected right" originates is not made clear. F.E.C. claims no federal protection in this case where the strike is concededly legal; it claims only the right to meet the strike without being handcuffed by an erroneous interpretation of the Railway Labor Act. Moreover, F.E.C. has not claimed, nor did the Court below grant, any "right to operate". F.E.C. claims only a "right to *attempt to* operate" as one of its economic weapons, and that the Railway Labor Act does not deprive it of that right.

the strike began. The testimony relates only to the level at which F.E.C. could have operated on May 26, 1964, with the work force it had been able to recruit by then, and to the reduction in operations which would then have resulted if it were forced to comply in all respects with the agreements (R. 353-54). *There is no question, however, that at the time the strike began and for a substantial period thereafter, F.E.C. could not have run a single train in compliance with the agreements* (R. 353, 359, Ex. R. 219-20) *and indeed could never have resumed service without using supervisory employees* (R. 204-08, 211-13, 359, 382, 384, 390, 394-95). Neither the United States nor the Unions has had the temerity to suggest the contrary, *notwithstanding that use of supervisors to operate is not provided for in the agreements.*

After the bombings of the F.E.C.'s property ceased, F.E.C. resumed passenger service. This is conceded by the Unions (U. br. p. 13, n. 10), but in the United States' brief the false impression is conveyed that F.E.C. still has not resumed passenger service (U.S. br. pp. 9-10 n. 9, 29). It is also stated that F.E.C. refuses to carry less-than-carload freight, but this is untrue as counsel for both the United States and the Unions well know (R. 758, 759-60, 769-71). There is no record support for the charge of laxity in F.E.C.'s hiring and training program.

The case of F.E.C.'s opponents rests heavily upon the supposed terrible consequences of allowing a carrier to employ self-help when faced with a strike. Again and again they contend that even the "reasonably necessary" rule enunciated by the Court below will lead inevitably to situations in which a carrier might not wish to settle a strike. They hypothesize that if a carrier has the right of self-help, and if it succeeds in

operating in spite of the strike, it may establish conditions most favorable to itself and broaden the areas of dispute.

This is pure fantasy. If at any time the unions feel that a carrier is having too much success in resisting a strike, they can, at their own choosing, terminate the right to resort to self-help by ending their strike.

The most that can be said for the assertions of the United States and the Unions is that a carrier forced to resort to self-help during a strike may find more efficient ways to operate. Every employer, whether a carrier or not, who has ever operated under a strike has had this experience. It is true that F.E.C. found innumerable ways it could operate more efficiently, including better equipment, automation, etc., as a result of being forced to innovate in order to operate during a strike. The F.E.C. served Section 6 notices proposing changes in agreements to reflect these efficiencies, as any carrier is legally entitled to do.[2]

It is further contended that the "voluntary settlement of disputes" provisions of the Act will be "undermined" if a carrier has the right to attempt to operate during a strike without regard to collective bargaining agreements. For, the agrument runs, the carrier will not accept a reasonable pre-strike settlement of a dispute if it knows it can institute whatever operating practices it desires once a strike is initiated. Aside

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[2] The Railway's service of Section 6 notices concerning the "Uniform Working Agreement" and the "Union Shop Agreement" and the controversy concerning its attempt to implement these notices because of the Unions' refusal to negotiate are not before this Court. The attempt by F.E.C.'s opponents to revive this controversy and make it significant in this case is dealt with *infra*, Point III.

from the fact that it assumes lack of good faith on the part of carriers in general (which has nowhere been shown to exist) this argument entirely misses the point. Any statute which, like the Railway Labor Act and the NLRA, contemplates an ultimate resort by the parties to labor disputes to their economic weapons, implicitly recognizes that the party in the strongest economic position will be least inclined to give way to the other's demands.

This is not a novel or a frightening thought—it is part and parcel of our collective bargaining system in which, as this Court said in *NLRB* v. *Insurance Agents' International Union,* 361 U.S. 477 (1960), "[the] necessity for good-faith bargaining" and "the availability of economic pressure devices . . . exist side by side . . . ." (361 U.S. at 489). The National Mediation Board has said in this regard:

> "As with any system or plan which seeks to retain freedom of contract and the right to resort to economic force, there have been periods of crises under the act, but in the aggregate, the system has worked well—it has settled large numbers of disputes both at the local and national level with a minimum of disturbance to the public."[3]

By use of hindsight and a "conspiracy theory" of the history of the instant dispute, F.E.C.'s opponents credit F.E.C. with an almost supernatural prescience, as if the Railway had encouraged the Unions to strike in order to be able to make temporary changes in operations. Nothing could be further from the truth. When the Unions struck, of course they believed they could force the Railway to cease opera-

[3] 26th Annual Report of the NMB (1959-60), p. 8.

tions—not by compelling adherence to existing collective bargaining agreements (for this theory was not advanced by them until long after the strike began), but merely by depriving F.E.C. of its entire work force. Initially their expectations were borne out because F.E.C. was completely closed down; ultimately they were disappointed, and so, more than a year after the strike began, they concocted their legal theories in an attempt to rectify their error. Clearly, however, the F.E.C. did not "foment" the instant strike. Moreover, the United States' assumption that other railroads will be encouraged to "foment" strikes in order to employ self-help is totally unsupported either by the record, by common sense, or by the facts of railroad industry experience. No employer "knows" in advance that he can operate during a strike; only a fool would deliberately foment one. The United States and the Unions fail utterly to demonstrate that across the nation carriers' resort to self-help would successfully defeat strikes, because no such showing is possible.

It is necessary to point out that even if the dire predictions of the United States were correct—i.e., that the balance of economic power lies with the carriers, which may be able to defeat strikes by resorting to self-help[4]—the remedy is not to reinterpret the Act

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[4] That this prediction is utterly baseless is, we submit, amply demonstrated by the fact that no one has ever before remotely suggested that there is any balance of economic power in favor of carriers. Once the procedures of the Act are exhausted, as this Court said in the *B&O* case, 372 U.S. 284 (1963), both parties are relegated to self-help. This means that the offices and compulsion of the government are no longer at work to resolve the dispute. Each party is legally in an equal position; the one with the stronger economic power will prevail.

so as to eliminate employer self-help. If the United States and the Unions are correct (which we deny) in stating that the unions' right to strike will be rendered a *practical* nullity by the carriers' economic power expressed through self-help, Congress, not this Court, must redress the balance.

The use and counter use of the economic weapons available to each party is the very essence of collective bargaining. And it is collective bargaining and its protection which is the cornerstone of the national labor policy. *NLRB* v. *Insurance Agents' International Union, supra,* 361 U.S. at 488-90, 495, 498; *NLRB* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333 (1938); *NLRB* v. *Brown,* 380 U.S. 278, 283-84 (1965); *American Ship Building Co.* v. *NLRB,* 380 U.S. 300, 317-18 (1965)—

> "In this case the Board has, in essence, denied the use of the bargaining lockout to the employer because of its conviction that use of this device would give the employer 'too much power.' . . .
>
> " '[W]hen the Board moves in this area * * * it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. It has sought to introduce some standard of properly "balanced" bargaining power . . . .'
>
> ". . . Indeed, the role assumed by the Board in this area is fundamentally inconsistent with the structure of the Act . . . ."

In this case the Unions, because their strike has not brought F.E.C. to its knees, and the United States, for reasons which are not readily apparent, seek to find in the Railway Labor Act an intention to protect

the labor organizations from the consequences of improvident strikes by prohibiting the use of self-help.

The argument in essence is that the carrier must suffer as a result of a strike in order that the strike can be settled. Thus it is contended that collective bargaining agreements must be complied with by the carrier during a strike because:

> "With both parties suffering from the dispute in direct proportion to its duration, some middle ground for compromise and settlement before too long would almost always be found." (U. br. p. 46)[5]

Similarly, the United States' stated "principal concern" is for the "future impact upon railway labor relationships" of a carrier having the right to operate after a strike commences. The United States worries that "by obtaining the ability, through abrogation of existing agreements, to run profitably despite the strike" (U.S. br. pp. 35-37), the carrier will not be inclined to settle the underlying dispute. The real position of the United States and the Unions is that this Court should engraft upon the Railway Labor Act a

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[5] Nowhere in the Union briefs is there any recognition of a unique provision of federal law which protects striking railroad employees by providing them with tax-free unemployment benefits which are paid from funds collected from the carriers. 45 U.S.C. § 351, *et seq.* The Railroad Retirement Board has reported that through May 31, 1965 $6,694,000 had been paid to strikers and non-strikers on the F.E.C. (only $1,848,000 having been paid to non-strikers). In no other industry are striking employees accorded such protection. Yet the Unions would have this Court hold that railroad carriers (and air carriers), unlike all other employers, must not be permitted to resort to self-help during a strike because otherwise, they assert, the balance of economic power might favor the carriers.

policy that the unions will prevail any time they strike.

Not a word in the statute or its legislative history suggests an intention to require that a strike be successful. Nowhere in any provision of the Act or any court decision interpreting it can there be found a hint of a policy which provides for or contemplates compulsory settlement of disputes or control of the outcome of a strike once it has commenced. Plainly, the purpose of the Act was to avoid strikes if possible by providing for mandatory bargaining, mediation, cooling off and the application of public opinion via the recommendations of an emergency board. Beyond this it did not go.

There has been no reference to any statutory provision or any legislative history supporting the theory which the United States and the Unions have advanced. In fact there is none. A major objective of the Railway Labor Act was the avoidance of strikes and their consequent harmful effects on the public interest in the continuity of rail transportation by requiring conferences and mediation and the maintenance of the status quo while such conferences and mediation were pursued. See *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515 (1937); *Estes* v. *Union Terminal Co.,* 89 F. 2d 768, 770 (5th Cir. 1937); *Brotherhood of Railroad Shop Crafts of America, Rock Island System, Grand Lodge No. 3* v. *Lowden,* 86 F. 2d 458 (10th Cir. 1936), *cert. denied,* 300 U.S. 659 (1937); *Brotherhood of Locomotive Firemen and Enginemen* v. *ICC,* 147 F. 2d 312 (D.C. Cir. 1945), *cert. denied,* 325 U.S. 860 (1945); *Stack* v. *New York Cent. R. Co.,* 258 F. 2d 739 (2d Cir. 1958). The contentions that the Act was also intended to maintain

the status quo once a strike commenced and to require the carrier to bargain with striking unions over practices required to combat a strike are frivolous unless the Act also outlaws strikes.[6] Having provided in four places in the statute for the preservation of the status quo prior to a strike, Congress certainly would have provided expressly for the preservation of the status quo during a strike had it intended to do so; but, there is no such provision.

F.E.C. is not contending for an "exception" to the Railway Labor Act as is repeatedly alleged in its opponents' briefs. Indeed, we submit, the Court below did not create any exception to the Act. F.E.C. is not contending either that it has a "federally protected" right of self-help. The right of self-help simply is not

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[6] The 1934 amendment to the Act containing Section 2, Seventh, which the United States and the Unions imply was meant to alter radically the *Act's* mediation and conciliatory procedures designed to *avoid strikes*, was clearly not intended to limit the right of self-help once a strike occurred. No change in the law was intended in the 1934 Act as the legislative history makes clear. As to Section 2, it was explained that:

> "The bill does not introduce any new principles into the existing Railway Labor Act, but it is designed to amend that act in order to correct the defects which have become evident as a result of 8 years of experience. It does not change the methods of conference, mediation, and voluntary arbitration to settle major disputes over wages and working conditions, which are provided in the Railway Labor Act of 1926, now in effect." (H. R. Rep. No. 1944, 73d Cong., 2d Sess. 2 (1934)).

In all its provisions and in its legislative history as a whole, the plain intention of the Act was *to avoid* strikes. The word strike never appears in the statute and there is not one provision of the Act which has any meaningful reference to what is required in respect to operations once the Act's procedures have failed to avert a strike.

taken away by the statute. What F.E.C. does contend is that once the labor organizations elect to use economic force against a carrier, the carrier is entitled to utilize fully the economic weapons at its disposal. Neither party to the dispute is inhibited in the legitimate use of its respective economic power. No special economic power is granted by the Act to the striking labor organization. Having unleashed economic warfare by refusing to work, the members of the labor organizations risk the possibility that the carrier can replace them and continue in operation; and, nothing in the Act reduces that risk. There is no policy governing the substantive terms upon which a dispute which had gone to strike should be settled.

Use of economic pressures is clearly "part and parcel of the process of collective bargaining" (*NLRB* v. *Insurance Agents' International Union, supra,* 361 U.S. at 495). *Unless Congress has specifically outlawed the use of a particular economic weapon, this Court has stated the use of that weapon is lawful in the hands of an employer* (361 U.S. at 498-99). See also *NLRB* v. *Brown, supra.* By the Railway Labor Act, Congress did not intend to balance the scales of collective bargaining more heavily in favor of one of the parties than the other. As the National Mediation Board has stated:

> "When the Board finds it impossible to bring about a settlement of any case by mediation it endeavors as required by section 5, first, of the act 'to induce the parties to submit their controversy to arbitration'. . . . Arbitration must be mutually desired and there is no compulsion on either party to agree to arbitrate. The alternative to arbitration is a test of economic strength between the parties." (26th Annual Report of the NMB (1959-60), p. 27)

The decision of the courts below which would restrict F.E.C.'s use of self-help and the positions of the United States and the Unions which would eliminate the right entirely by preventing or hampering the efforts of a carrier to get back into operation during a strike should be rejected by this Court.

II. THE LITERAL WORDING OF THE STATUTE, CONSISTENT INDUSTRY PRACTICE AND THE HOLDINGS OF THE NATIONAL RAILROAD ADJUSTMENT BOARD ALL ARE CONTRARY TO THE POSITION ADVANCED BY THE UNITED STATES AND THE UNIONS.

Clearly, there is no intention manifested in the Railway Labor Act to give unions a free hand in their use of economic weapons while tying the carriers' hands; nor, is the carriers' right of self-help (which, sans the statute, clearly exists) in any way expressly limited or taken away. Indeed this Court has held that once the Act's procedures are exhausted, the mutual use of self-help is all that is available to resolve disputes between labor and management. And, as the National Mediation Board itself has stated, after the Act's procedures have been exhausted, "the alternative to arbitration is *a test of economic strength.*"

It is contended, however, that under the Railway Labor Act, self-help is not available to a struck carrier because the alleged "literal" language of the statute precludes it from meeting strike-caused conditions except by complying strictly with collective bargaining agreements. Only in respect to matters in dispute which have gone through the statutory mediation process is the carrier free to alter its normal practices and then, the argument goes, it may only alter conditions within the limits of its prior Section 6 proposals.

It is not strange that the United States has failed thus far ever to cite or mention this Court's decision

in the *B&O* case.[7] Obviously, the holding there that the right of "self-help" is available to a carrier and the generally accepted meaning of this right completely negate the interpretation of the Act which is urged.

The United States and the Unions would have the Court believe that the only steps which F.E.C. could take in self-help were to pay the rates of pay to the non-ops and to give the notice of abolition of jobs contained in F.E.C.'s Section 6 notices given prior to the strike of January 23, 1962. Of course, they do not advert in making this argument to the fact that there were no scope (non-supervisory) employees to pay at the time of the strike. Even after resumption of operations, the vigorous hiring program initiated by the Railway did not succeed in attracting sufficient skilled personnel to make compliance with agreements possible (R. 661-62, 666-67, 672-74, 685-87, 702, 712-14, 723-24, 744, 753, 761-64, 775-86). The plain fact is that all of the unions and their members had, by going on strike and honoring picket lines, created working conditions 100% different from those embodied in, and contemplated by, the agreements. If, in fact, what F.E.C. did to meet the strike was a "change" in "the rates of pay . . . etc. . . . of its employees, as a class, *as embodied in agreements*"[8] within the meaning of Section 2, Seventh, of the Act, then the strike was also a change in the status quo unilaterally made by the Unions and their members, and must under the theory espoused have also been unlawful. Or, as stated in

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[7] *Brotherhood of Locomotive Engineers, et al.* v. *Baltimore & Ohio Railroad Co., et al.*, 372 U.S. 284 (1963). The unions mention the case casually (U. br. pp. 41-42), (R.L.E.A. br. pp. 7-8).

[8] Emphasis is supplied throughout unless otherwise indicated.

our initial brief (p. 23) the conditions set forth in agreements were changed by the Unions when they struck. Under no interpretation can it be said that the Railway changed conditions—it merely reacted to strike-changed conditions.

The United States and the Unions, in purporting to follow the "literal" language of Sections 2, Seventh and 6 of the Act, appear to maintain that the language, which in some instances refers to carriers without mentioning the unions, restricts carriers in the use of self-help without limiting the right to strike. This is nonsense. Until the Act's procedures have been exhausted, the status quo provisions of the Act apply equally to both parties. Thus, Section 5, First of the Act (45 U.S.C. § 155, First) states:

> "If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for 30 days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

Similarly, Section 10 (45 U.S.C. § 160), providing for the creation of Presidential emergency boards, states that:

> "After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

Clearly, after expiration of the cooling-off periods provided by Section 5, First and Section 10 of the Act,

both parties are equally free to resort to self-help. There is a clear parallel between the right to strike and the carrier's right to self-help, neither of which is mentioned in the Act. Both exist side-by-side. The Act simply does not require the maintenance of any status quo during a strike.

The legislative history of the 1934 amendments to the Railway Labor Act makes it clear that the language in Section 2, Seventh of the Act, was used for a particular reason. The purpose of Section 2 of the Act, as amended in 1934, was "to provide for the complete independence of carriers and of employees in regard to self-organization" and "to prohibit any interference with freedom of association among employees . . . ."[9] One of the ways in which a carrier may hinder the right of employees to organize and to choose representatives freely is to attempt, while bargaining and mediation are still in process, to make permanent changes in rates of pay, rules or working conditions as embodied in agreements without consultation or negotiation with the duly selected representative of the employees. This form of undercutting of the authority of the duly designated employee representatives was what Section 2, Seventh was intended to outlaw. There is not the slightest evidence that the intention of Section 2, Seventh was to inhibit the carrier's ability to respond to strikes by making adjustments to strike conditions after exhaustion of the Act's procedures.

What Section 2, Seventh (45 U.S.C. § 152, Seventh) says is that a carrier cannot *change the provisions of agreements* relating to working conditions, rules or rates of pay without first exhausting the Act's proce-

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[9] H.R. Rep. No. 1944, 73d Cong., 2d Sess. 1-2 (1934).

dures. This is borne out by Section 6 which again specifically prohibits only "an intended *change in agreements* affecting rates of pay", etc. (45 U.S.C. § 156). Neither section refers to strike-induced temporary practices which do not involve a "change in agreements". The contention of the Unions and the United States and the decision of the courts below misapply the statutory language insofar as temporary practices designed to meet a strike are concerned. Sections 2, Seventh and 6 both refer expressly and only to changes in agreements and to nothing else. Moreover, the opposition completely overlooks the over-all scheme of the statute which is to preserve the status quo *prior* to a strike being called so as to foster the basic purpose of avoiding interruption to interstate commerce arising from strikes.[10]

Recognizing, as it must, the absurd results to which their argument would lead, especially in the case of a massive strike, the United States seeks to justify its interpretation of the statute by a claim that the railroad industry practice is to refuse to attempt to operate during a strike. For some inexplicable reason the United States concedes that the airlines (subject to the same Act) do try to operate.

For the first time in this litigation, the claim was made in the United States' petition for certiorari (pp. 14-15, "that FEC is the only railroad carrier to attempt to operate during a strike in the last five years." In its initial brief to this Court, commenting on the

[10] See 45 U.S.C. §§ 151a, 152; S. Rep. No. 222, 69th Cong., 1st Sess. 3 (1926); H. R. Rep. No. 328, 69th Cong., 1st Sess. 1 (1926); H. R. Rep. No. 1944, 73d Cong., 2d Sess. 2 (1934); Hearings Before House Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong., 2d Sess. 38 (1934). See also cases cited at p. 11, *supra*.

"'reasonably necessary'" rule of strike operation fashioned by the Court below and upon F.E.C.'s position, the United States says:

> ". . . Such a rule should, in these circumstances, not be established *unless it has clear historical roots within the railway industry as an implicit gloss upon the otherwise unqualified statutory language.* We now show that such an understanding has never existed. . . ." (U.S. br. p. 38)

Repeatedly in support of various phases of its argument, the United States adverts to the supposed industry practice of not operating during a strike. Thus:

> "In the railway industry, it has been highly unusual for a struck carrier to attempt to operate." (U.S. br. p. 41; see also U.S. br. pp. 47-48)

We take it as virtually conceded that if the practice is contrary to that described by the United States, the interpretation of the Act urged by them, and adopted in large part by the Court below, must be erroneous.

The United States' concept of the industry practice is totally at variance with the facts. The brief of the Association of American Railroads refers to numerous examples of operations by carriers during strikes and quotes the uncontradicted testimony relating to this accepted practice given during the proceedings of the Presidential Railroad Commission (A.A.R. br. pp. 19-22). The A.A.R. states its concern as amicus curiae as follows:

> *"The Court of Appeals has construed and applied the Act so as to overturn a practice followed by the railroads for generations and never questioned before"* (A.A.R. br. p. 2),

and the A.A.R. is fully qualified to state what the practice actually is.

The implications of the position of the United States, as well as the decision of the courts below, if the situation which faced F.E.C. were nationwide in scope are far reaching. That situation actually existed in 1946. Following exhaustion of the procedures of the Railway Labor Act, the Brotherhood of Locomotive Engineers and the Brotherhood of Railroad Trainmen went out on strike, causing a nationwide interruption to railroad commerce.

In "Railway Age," Volume 120, June 1, 1946, page 1103, there appears an article entitled "Many Trains Were Run Despite The Strike", which commences as follows:

> "The determination of railroad managements to meet their obligations to serve the public despite the difficulties created by the strike on May 23 of employees belonging to the trainmen's and engineers' brotherhoods is reflected in the following road-by-road report of operations during the period the strike was effective. . . ."

Railway after railway is shown to have maintained some operations using "supervisory employees", "officers" and "volunteers". Indeed the F.E.C. as it had during every prior strike operated using supervisors. Similarly, as this brief was being written many of the railroads subjected to the March 31, 1966 strike by the Brotherhood of Locomotive Firemen and Enginemen were in partial operation using supervisors according to press accounts.[11] Yet, according to the

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[11] See e.g., the Washington Evening Star, Friday, April 1, 1966, p. A-1, col. 2, cont'd p. A-4, col. 6; Washington Evening Star, Saturday, April 2, 1966, p. A-1, col. 8, cont'd p. A-14, col. 1; Washington Sunday Star, April 3, 1966, p. A-6, col. 4; Miami Herald, Friday, April 1, 1966, p. 1, col. 1; Florida Times Union, Friday, April 1, 1966, p. 1, col. 1.

United States and the Unions, use of supervisory employees to operate a train is *per se* a violation of agreements and of the Act.

The sole reference by which the United States attempts to support its assertion is to the reports of the National Mediation Board, which contradict rather than support its claim. These reports, which most often do not mention whether or not a carrier has operated during a strike, reveal nevertheless the extent to which carriers under the Railway Labor Act do operate, strike or no strike. The recent examples of operations during strikes cited by the A.A.R. (A.A.R. br. p. 19, *et seq.*) disprove the assertion and the Reports of the National Mediation Board likewise disprove the claim. Time and again language of the following character is found in the Reports:

30th Annual Report of the NMB (1963-64), p. 12:

"... One of these strikes involves the Flight Engineers' International Association and Eastern Airlines, Inc., which began on June 23, 1962. Regular flight operations, however, were resumed by the carrier in September 1962. The other strike involves Florida East Coast Railway Company. The Eleven Cooperating Railway Labor Organizations, representing non-operating employees, withdrew from the service of the carrier on January 23, 1963. However, the carrier resumed operations on or about October 1, 1963, on a limited basis and has continued to operate."

21st Annual Report of the NMB (1954-55), p. 5:

"The most serious and prolonged strike occurring during the fiscal year involved a group of carriers, generally referred to as the 'Louisville & Nashville Railroad System'."

p. 6:

> "Efforts by these carriers to continue operation of their lines resulted in a few minor work stoppages at connecting points with other railroads."

23d Annual Report of the NMB (1956-57), p. 4:

> "A strike of 22 days' duration occurred on this carrier [Denver Union Terminal Railway Company] . . . . Except at the very beginning this carrier operated almost on a normal basis all through the strike."

In fiscal year 1961 there were 18 railroad strikes involving 27,800 employees lasting in the aggregate 236 days. As to strikes during this period the NMB stated that they:

> ". . . did not seriously interrupt interstate commerce. In several instances carriers continued operations during the strike period."[12]

We note that although the F.E.C. strike and its resumption of operations is referred to a number of times in the NMB Reports, nothing in the reports would signify anything unusual or unlawful about F.E.C.'s actions. In fact the 31st Annual Report of the NMB (1964-65) does not even mention the F.E.C. strike. The language elsewhere used to report F.E.C.'s resumption of operations is precisely the same language utilized in describing the return or maintenance of operation by the other carriers referred to.

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[12]27th Annual Report of the NMB (1960-61), p. 10. See also: 22d Annual Report of the NMB (1955-56), p. 6; 23d Annual Report of the NMB (1956-57), p. 4; 24th Annual Report of the NMB (1957-58), pp. 8, 9; 25th Annual Report of the NMB (1958-59), pp. 8, 9, 10, 13; 26th Annual Report of the NMB (1959-60), pp. 13, 14; 27th Annual Report of the NMB (1960-61), pp. 10, 11, 14; 28th Annual Report of the NMB (1961-62), p. 11; 29th Annual Report of the NMB (1962-63), pp. 1, 10; 30th Annual Report of the NMB (1963-64), p. 12.

That the practice of rail and air carriers to try to operate during a strike has always been recognized without question is emphasized by the facts that: (a) in both the *Trainmen* case (as noted in that opinion) and in this instant case the Unions conceded that supervisory personnel could be used to operate and that contract structure need not be maintained when sufficient crews were not available; and (b) the United States did not file the instant suit until more than sixteen months after the strike began. If F.E.C.'s actions were so unusual and unlawful, surely the Unions' concessions would not have been made and someone would have moved sooner to prevent such actions.

The truth of the matter is that the consistent practice of carriers to meet strike situations by using supervisors or officers has never before been questioned. For example, in the *amicus curiae* brief of the Association of American Railroads in *United Steelworkers of America* v. *NLRB,* No. 89, October Term, 1963, it was stated at page 6:

> ". . . railroads attempt to run their trains with supervisory personnel when regular crews, whose members belong to railroad labor organizations, refuse to cross picket lines."

This practice has been adverted to in many cases, illustrative of which are the following: *In Re Missouri Pacific,* 23 LRRM 2135, 2136 (E. D. Mo. 1948); *Lumber & Sawmill Workers Union,* 122 NLRB 1403, 43 LRRM 1324 (1959), *rev'd sub nom., Great Northern Ry. Co.* v. *NLRB,* 272 F. 2d 741 (9th Cir. 1959); *Missouri Pacific R.R.* v. *Brick & Clay Worker Board 602,* 238 S.W. 2d 945 (Ark. Sup. Ct. 1951).

Contrary to the astounding claim of the United States, the National Railroad Adjustment Board

Divisions (NRAB) have consistently held that agreements are *not* violated by the carrier's attempts to operate in any manner it sees fit during a strike. It is said (U.S. br. p. 42) that, ". . . numerous decision [sic] of the railroad adjustment boards . . . reflect the clear understanding that whenever strike operation is undertaken, it must conform with existing collective agreements."

The National Railroad Adjustment Board has consistently held that a carrier has a legal duty to perform its public service during a strike, and that the union agreements are not operative during the strike, and that a strike creates an emergency condition which justifies performance of the work in any manner found necessary. For example, the *Brotherhood of Railroad Trainmen and Kentucky and Indiana Terminal Railroad Company* case (NRAB, 1st Division, Award No. 17,055 (1955)) involved service by a railroad to a struck plant. The regular crews refused to cross the picket line to serve the struck plant and the company over an extended period, from September, 1949, through January, 1950, served the plant by using supervisors. Various claims were involved including a claim that supervisors performed switching outside of the strike area; that men on the extra board were not called and they were ready and available to perform the service; that a pilot was not used to accompany the supervisory crew; and that other men on the extra board were not called to fill positions of men who should have been called as pilots. All claims were denied. The Adjustment Board stated, in part, as follows:

> ". . . They [employees] base their claims on their contention that the company officials 'had no

seniority rights' and therefore acted 'in violation of the current agreement.'

* * *

"We agree that the officers did not have employee 'seniority rights', as those rights are defined and described in the agreement between the parties. But *it is the duty of the carrier to perform its public services and when its regular employees refuse to perform them, they cannot, reasonably, say the carrier violated their 'seniority rights' if it uses its officers to perform its services.*"

The *Brotherhood of Railway and Steamship Clerks, et al. and Macon, Dublin & Savannah Railroad Company* case (NRAB, 3d Division, Award No. 10,197 (1961)), relied upon by the United States, involved a strike called on the property of the carrier by the Brotherhood of Railroad Trainmen. The carrier abolished claimant's position of Chief Clerk in the Traffic Department during the period of the strike and work which he would have performed but for the strike was performed by supervisors or non-scope employees. Claimant asserted that the carrier violated the agreement. The Adjustment Board stated, in part, as follows:

". . . The Claimant's position was abolished and he was furloughed due to a Trainmen's strike during the period of this claim. The Board finds that due to the Trainmen's strike that *an emergency condition existed which justified the action by the Carrier during the period of claim.*"

The *Brotherhood of Maintenance of Way Employees and St. Louis Southwestern Railway Company* case (NRAB, 3d Division, Award No. 5042 (1950)), upon which the United States relies, involved a strike by the unions representing the carrier's engineers, fire-

men and switchmen. The Brotherhood of Maintenance of Way Employees filed a claim for pay which it alleged was due under its weekly guarantee for time lost when its members were laid off on account of a threatened strike by other railroad employees. The Adjustment Board stated in part that,

> "The record is clear that Carrier was faced with a complete termination of train operations at 6:00 A.M. on May 11, 1948, because of a threatened strike. Under such circumstances Carrier could properly abolish all positions remaining to protect itself from loss . . . .
>
> "The Organization contends that the act of the Carrier in abolishing the positions of claimants was in violation of the guarantee rule. This rule guarantees six days work of eight hours each per week during the existence of the employment relationship. It has no application to an employee whose work has been terminated by the abolishment of his assigned position."

The *Brotherhood of Maintenance of Way Employees and Missouri Pacific Railroad Company* case (NRAB, 3d Division, Award No. 5074 (1950)), cited by the United States involved a strike against the carrier by its trainmen, enginemen and yardmen and various claims by the Brotherhood of Maintenance of Way Employees protesting the Carrier's reduction of its non-operating forces by reason of a strike by its operating employees. The Adjustment Board denied the claim and stated in part that,

> ". . . here, as in all strike situations, we find the Carrier called upon to exercise its best managerial judgment in the face of a protracted and prolonged dispute with the operating personnel of its railroad. . . . That the Carrier had a

> right to reduce forces by abolishing positions . . . is no longer an open question in this forum. See Awards 4001, 3838, 3682, 4455 and 4787 above cited.
>
> * * *
>
> "The latest pronouncements of this Board on the subject of applying 'guarantee' rules to strike situations are found in Awards 4099 and 5042, wherein it is held in effect that *'guarantee' rules are not enforceable during strikes.*
>
> "*We think it better to look upon these agreements for what they really are—rules governing wages, hours of service, and working conditions of employees as long as they remain in the service of the employer . . . .*"

Frankly we do not understand how the United States could have cited any of the foregoing NRAB cases as support of its position.[13] That the bargaining agreements are in effect suspended during a strike seems clear. This is the actual understanding of all carriers, rail and air, as well as the unions, and is consistent with the position of the NRAB. Whether the agreement is regarded as "suspended" or containing an implied exception for an "emergency condition" is purely a matter of semantics without effect on the carrier's right to operate. The repeated assertions by the United States and the present position of the Unions to the contrary understandably are not sup-

[13] The United States also cites in support of its position the case of *Brotherhood of Maintenance of Way Employees and Atlanta and West Point Railroad*, NRAB, Third Division, Award No. 4170 (1946), a case in which the NRAB denied the carrier's right to lay off maintenance-of-way employees during a strike by engineers and trainmen. The maintenance-of-way employees, unlike F.E.C.'s employees in the instant case, were neither on strike nor respecting picket lines, the carrier did not attempt to justify its action on any grounds related to the strike, and the case is entirely irrelevant.

ported by any of the authorities cited and as a matter of fact are flatly contradicted by many of the purported authorities.

Both the Unions and the United States contend that it is the carrier's duty to negotiate with the bargaining representatives over any change in operation during a strike; and that remaining or replacement employees are entitled to the benefits of the agreements (U.S. br. p. 27, *et seq.*, U. br. p. 32).

Nothing could be more absurd than bargaining over proposals to effectuate operation of the carrier during a strike with the very people who by their strike had tried to stop operations. We do not deny that, to the extent that negotiations with the unions representing the striking workers are requested by either party as to means for settling the strike, it is the duty of both sides to negotiate. But negotiations with the strikers over ways to operate during the strike would most certainly be an exercise in futility.

Similarly, the notion that F.E.C. was required to accord to replacements for the strikers all benefits of the agreements without deviation (U.S. br. p. 27, n. 20) is mistaken. The argument is not supported by the cases cited which *do not* (1) involve strike situations and (2) involve attempts by employers to undercut existing collective bargaining agreements by making permanent individual agreements with individual employees so as to supersede the collective agreements. That is not the situation here. The *Steele* and *Howard* cases (U.S. br. p. 27) have nothing to do with the question whether during a strike a carrier has to comply with agreements. There is no authority whatever for the contention; and, in the circumstances which faced F.E.C. at the time of the strike, to state the claim is to refute it.

III. THE ARGUMENT OF THE UNITED STATES AND THE UNIONS CONFUSES F.E.C.'S RIGHT OF SELF-HELP DURING A STRIKE WITH ITS RIGHT TO MAKE PERMANENT CHANGES IN AGREEMENTS

Both the United States and the Unons, in their initial briefs to the Court, are guilty of a most egregious error of fact and law in failing to distinguish between those changes necessitated by strike conditions and intended to endure only so long as the strike lasts, and those changes proposed to be made in collective bargaining agreements which are intended to exist regardless of the strike. The Railway Labor Act's procedures are applicable to the latter, not to the former. In their zeal to confuse this very real distinction, the United States and the Unions again resort to imprecise statements of fact and misinterpretations of the law, including citation of entirely irrelevant decision of the court. We take up first the facts, then the law.

Facts:

At the time of the strike, F.E.C. had no independent dispute with its operating employees and, except for two issues concerning wages and notice of job abolition, there was no other dispute with the non-ops. It is not the railroad which "broadened the area" of the original dispute by taking unilateral action but the Unions which converted a dispute of relatively small proportions into "a test of economic strength" by striking and honoring picket lines. The "wholesale changes" in working conditions referred to by the United States were brought about by the strike, a loss of the entire non-supervisory work force, and were not originated unilaterally by F.E.C. to prolong a dispute or to make changes it desired. Nor did F.E.C. make

changes in agreements or changes in "the rate of pay, rules, or working conditions of its employees, as a class, *as embodied in agreements . . .*" (45 U.S.C. § 152, Seventh). F.E.C. merely met the conditions which the strike created.

F.E.C. did not "abrogate" any agreements. It concedes that the strike provided no basis for attempting *permanent* changes in the agreements themselves. Some time after the strike began F.E.C. gave two Section 6 notices and did seek to place them into effect following a failure of the unions to negotiate concerning them. *This action was enjoined by the courts below and is not before this Court.* Before the Court now are only the temporary practices adopted to meet the strike, practices which in no way alter or change working conditions, rules, or rates of pay as contained in agreements.

The "Conditions of Employment" promulgated by F.E.C. in October of 1963, were a reduction to writing of certain of the Railway's temporary operating practices followed in direct response to the strike. Thereafter, F.E.C. also proposed amendments to existing agreements by serving a Section 6 notice embodying a set of working conditions denominated "The Uniform Working Agreement".[14] The similarity

[14] The United States and the Unions have seen fit to suggest (U.S. br. p. 6; U. br. pp. 17-18) that F.E.C. refused to negotiate over this notice by insisting on the presence of a reporter at negotiating sessions. (In the *Trainmen* case, *infra*, 336 F. 2d at 182, n. 28, the Court based its decision on other grounds and did not reach this question.) The record in the *Trainmen* case shows that the presence of a court reporter at such sessions was a practice accepted by the unions in previous conferences with F.E.C. over the same issues, and that the unions used the reporter's presence at the conferences in question to disguise an obvious refusal to bargain

between the temporary "Conditions of Employment" and the "Uniform Working Agreement" noted by the United States and the Unions is a fact devoid of juridical significance, for it does not convert temporary strike practices into unilaterally imposed permanent modifications of agreements which the Act forbids.

The United States and the Unions have only one reason for confusing the "Uniform Working Agreement" with the temporary conditions of employment resorted to by the Railway in attempting to operate during the strike, and that is to make it appear that the strike-induced practices were permanent changes forbidden by the Act. Of course this is fallacious. The operating practices represented by the "Conditions Of Employment" were and are terminable at the will of the non-ops, since they may at any time compel F.E.C. to revert to the collective bargaining agreements merely by calling off their strike.

The Law:

Does the Railway Labor Act forbid the carrier from making the sort of temporary adjustments to strike conditions represented by the "Conditions Of Employment"? This is a question which the United States and the Unions attempt to answer affirmatively

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over F.E.C.'s Section 6 notices (Joint Appendix Record in No. 691, O.T. 1964, pp. 29, 94-96, 125-26, 170). Concerning F.E.C.'s Section 6 notices embodying the "Uniform Working Agreement", the Presidential Emergency Board stated, "Of the various organizations receiving these notices, only the International Association of Railway Employees and the Brotherhood of Railroad Trainmen agreed to negotiate with the Company." (Ex. R. 459). The view of F.E.C.—that a party insisting upon the presence of a court reporter is not guilty of a refusal to bargain—has now been accepted by the Court of Appeals in *NLRB* v. *Southern Transport, Inc.*, — F. 2d —, 61 LRRM 2277 (8th Cir. 1966).

by reference to a host of court decisions having nothing at all to do with temporary, strike-induced changes in employment conditions. In this category are: *Manning* v. *American Airlines, Inc.*, 329 F. 2d 32 (2nd Cir. 1964), *cert. denied*, 379 U.S. 817 (1964); *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192 (1944); *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957), *reh'g denied*, 353 U.S. 948 (1957); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952); *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342 (1944); *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944); *Railroad Yardmasters* v. *Pennsylvania R. Co.*, 224 F. 2d 226 (3d Cir. 1955); *Ry. Employees' Co-op Ass'n* v. *Atlanta B. & C. R. Co.*, 22 F. Supp. 510 (D. Ga. 1938); *Rutland Ry. Corp.* v. *Brotherhood of Locomotive Engineers*, 307 F. 2d 21 (2d Cir. 1962), *cert. denied, Brotherhood of Locomotive Engineers* v. *Rutland Railway Corp.*, 372 U.S. 954 (1963); *Order of Ry. Conductors* v. *Pitney*, 326 U.S. 561 (1946), *reh'g. denied*, 327 U. S. 814 (1946); *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711 (1945), *opinion on rehearing*, 327 U. S. 661 (1946); *Pullman Co.* v. *Order of Ry. Conductors and Brakemen*, 316 F. 2d 556 (7th Cir. 1963), *cert. denied*, 375 U.S. 820 (1963); *Butte, Anaconda & P. Ry. Co.* v. *Brotherhood of L. F. & E.*, 268 F. 2d 54 (9th Cir. 1959), *cert. denied*, 361 U.S. 864 (1959).

A second category of Railway Labor Act cases (four are cited—all airline cases) do involve strike situations, but each stands for a proposition totally at odds with that for which the case is cited. These are *Flight Engineers* v. *Eastern Air Lines*, 208 F. Supp. 182 (S.D.N.Y. 1962), *aff'd*, 307 F. 2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963); *Pan American*

World Airways, Inc. v. *Flight Engineers' International Ass'n, PAA Chapter*, 306 F. 2d 840 (2d Cir. 1962); *Western Air Lines* v. *Flight Engineers Int'l Ass'n*, 194 F. Supp. 908 (S.D. Cal. 1961); and *Airlines Pilots Ass'n* v. *Southern Airways, Inc.*, 49 LRRM 3145 (M.D. Tenn. 1962).[15]

A third category of cases relied upon by the United States are National Labor Relations Act cases cited in a three-page footnote (U.S. br. pp. 38-41). They do not support the assertion that the NLRA cases are "wholly consistent" with the United States' position. See *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). Indeed, they appear to support at least the "reasonably necessary" rule of the courts below for the United States' brief states that only "any unilateral action which is not *reasonably necessary* to maintain strike operations would be clearly unlawful" under the NLRA decisions. These cases clearly do not negate the right of self-help during a strike, and the policy of the NLRB consistently has been to recognize that strikes create conditions which warrant a different treatment of employees who work during the strike. Illustrative are the following decisions and rulings: *Mission Mfg. Co.*, 128 NLRB 275, 46 LRRM 1289 (1960); General Counsel Adm. Rulings Nos. SR-494, 46 LRRM 1253 (1960); SR-1170, 47 LRRM 1601 (1961).

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[15] The first three cases all involved the same dispute with the Flight Engineers, which the Union lost, and uphold rather than deny the right to try to operate during a strike. The fourth case likewise does not support the contention for which it is cited. The changes made were *permanent* and it is to this kind of a change *only* that the rule that the right of a party to effect changes may not be enlarged beyond those spelled out in the Section 6 opener applies.

Carefully ignored in the barrage of citations are the cases cited and quoted in F.E.C.'s brief which hold squarely that (1) self-help is available to a struck carrier and (2) the collective bargaining agreements are not in force against the carrier during a strike (see F.E.C. br. pp. 16-19, 25, 28-30). Also very carefully ignored, as we have observed before, is this Court's decision in the *B&O* case, *supra,* which clearly establishes the carrier's right of self-help once the Railway Labor Act's procedures are exhausted.

As has been set forth above (Point II) the right of a carrier to try to operate during a strike has never before been challenged. Unless clearly deprived by the statute of the right to operate, the right exists and should not be tampered with.

With a responsibility for moving traffic in aid of the nation's needs, rail and air carriers should not be restricted in making an attempt to operate in an emergency which a strike brings about. The position of the United States and the Unions and of the courts below means necessarily that regardless of the common good, and in spite of a national emergency a rail or air carrier could not, in the face of a strike which deprived it of its union employees, try to operate during an emergency unless full compliance with bargaining agreements was maintained. The Railway Labor Act could not have intended such a result.

IV. THE UNITED STATES EFFECTIVELY CONCEDES THAT THE PROPER FORUM FOR ADJUDICATION OF SUITS TO ENFORCE OR APPLY COLLECTIVE BARGAINING AGREEMENTS DURING STRIKES IS NOT THE FEDERAL COURTS BUT THE NRAB.

After taking a contrary position for forty-eight pages, in an astounding about face, the United States makes the following statement (U.S. br. 48-49):

> "(3) *Even where collective bargaining agreements make no explicit provision for a strike situation, it may be open to a carrier to urge that limited departures from the literal terms of its agreements are permissible under a fair reading of these agreements.* Without in any sense departing from the agreements, relief[16] may thus be obtained under appropriate doctrines of contract interpretation applicable to abnormal conditions . . . .
>
> "Indeed, at least some of FEC's unions have shown a willingness to respect such conditions of impossibility. In the *Trainmen's* case, 336 F.2d 172, it appears that the union conceded that its agreement with FEC did not completely preclude the use of supervisory personnel in some positions when other replacements were, in fact unavailable. *Similarly, the government has never suggested that FEC would be totally foreclosed from making all changes in working rules or conditions during a strike, should such changes be asserted as proper under a fair reading of the contract* . . . . Should disagreement arise over the application of contract terms where such contentions are made by the carrier under the contract and rejected by the union, the Act provides a clear basis for an arbitrated settlement through invocation of the 'minor' disputes procedure by the appropriate division of the National Railroad Adjustment Board."

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[16] It is assumed that the "relief" obtainable would be in the guise of the denial of an award to a claimant before the NRAB.

This passage, which is consistent with an earlier reference to the "adjustment boards" as "the primary statutory agency for interpreting the effect of collective agreements" (U.S. br. p. 40), is a most significant concession. The error which the United States makes in passing is the assertion that, "Such a contention that its changes were proper under the contract was not made by F.E.C." *This is not true.* The Railway maintained both in the District Court and in the Court below that the contracts were suspended during the strike, but if they were not suspended the temporary operating practices adopted in response to the strike were contractually justified, and for this reason it has continually urged that jurisdiction over the subject matter of the United States' action was not in the courts below, but in the NRAB (R. 106, 108, 116-19, 570-71).

Clearly, as the statements of the United States imply, immediately upon finding that the agreements remained in active force during the strike period, the District Court exhausted whatever jurisdiction it may have had, and was without power either to issue an injunction enforcing the agreements or to decide what portions of those agreements were to be unenforceable on grounds of "reasonable necessity." The doctrine of "reasonable necessity" is no more than the principle of impossibility of performance dressed up. And, it is the NRAB alone which had jurisdiction to decide, as a matter of contract interpretation, which contract provisions, if any, should be enforceable during the strike.

In its initial brief (pp. 37-39), F.E.C. listed a number of matters taken up in District Court which it contends were pure questions of contract interpretation and application. The United States' statements

above not only concede this point, but appear to go even further. The United States claims that what a carrier may or may not do during the period of a strike may be considered as a matter of contract law. It states that, even in the absence of specific provisions in agreements relating to a carrier's strike operations, "it is most likely that existing agreements . . . do, in fact, incorporate a mutual understanding . . ." (U.S. br. at 47-48). That "understanding", it maintains, based on its view of the industry practice, is that "strike operation will not be attempted contrary to the terms of these agreements." As already demonstrated *supra*, Point II, there is indeed an industry practice, which has been regarded as a contractual "understanding", but it is exactly contrary to that asserted by the United States. Whatever be the understanding, the NRAB[17] and not the District Court, was the proper body in which to seek an interpretation and application of it. The courts below clearly lacked jurisdiction to enforce existing agreements in whole or in part. They most certainly circumvented the NRAB improperly by adjudicating day to day contract disputes during the strike.

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[17] The case of *Western Air Lines* v. *Flight Engineers Int'l Ass'n*, *supra*, erroneously cited by the United States in support of a different proposition, squarely supports the jurisdiction of the NRAB to determine disputes concerning the applicability of agreements during strikes. See, also, *Flight Engineers Int'l Ass'n* v. *Western Air Lines*, 48 LRRM 2487 (S.D. Cal. 1961).

V. ADDITIONAL ERRORS OF FACT AND LAW BY THE UNITED STATES AND THE UNIONS FURTHER WEAKEN THEIR POSITION.

A. The Toledo Case[18] Is Misapplied by the Unions

The Unions devote one point of their initial brief (U. br. pp. 47-49) to the contention that the *Toledo* case, refusing to grant an injunction sought by a railroad which had declined arbitration prior to a strike, applies herein so as to deny F.E.C. the right to apply to the District Court for approval of "reasonably necessary" employment practices during the strike period. This contention is so clearly erroneous that even the United States, which cites the *Toledo* case in support of another proposition (U.S. br. pp. 45-46), refuses to advance it.

In the first place, the facts of the *Toledo* case have nothing to do with those of the instant case. There, during a state of national emergency, the unions postponed their strike and agreed to arbitration. The carrier's refusal to arbitrate precipitated the strike. Here, although F.E.C. did not reject arbitration, but requested further mediation, the unions flatly rejected further mediation or arbitration prior to the strike.[19] Instead they attempted for several months to compel the Railway to cease operations, and agreed to arbitration only after the Railway had restored operations during the strike period. The F.E.C. was clearly under no duty of any sort, legal or moral, to arbitrate at

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[18] *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S. 50 (1944).

[19] The letters of F.E.C., the Unions and the NMB on the subject are printed in Appendix A hereto. The assertion that initially, both parties rejected arbitration is based upon an erroneous understanding of a statement in the Emergency Board Report.

that point. The assertion of the United States (U.S. br. p. 46) that agreement of F.E.C. to arbitrate after the strike had commenced would have required "immediate cessation of the strike" is wrong and is based on the erroneous assumption that such an agreement would necessarily return the parties to their pre-strike positions.

Furthermore, the *Toledo* case is entirely inapposite since there, the carrier, having brought on the strike by refusing arbitration, sought the aid of a court in equity; whereas, here, the Unions declined arbitration and chose to strike. Under the doctrine of the Court below in the instant case and in the *Trainmen* case, a carrier has a *legal* right to resort to self-help, and applications for approval of "reasonably necessary" employment practices are merely one means of vindicating this legal right. They are not in any sense requests for equitable relief. The irrelevance of the *Toledo* case to the instant litigation is beyond dispute.[20]

B. F.E.C. Does Not Contend That the Railway Labor Act Is "Suspended" During a Strike, Nor Does It Seek To Establish Any "Exception" to the Act

In numerous instances both the United States and the Unions unfairly characterize F.E.C.'s position as claiming that the statute is "suspended" during strikes, or that the operations of a strike-bound carrier represent an "exception" to the Act (U.S. br. pp. 25, 26, 31, 33-34, 38, 39, 51; U. br. pp. 30, 32, 33, 43, 44, 45, 47-49). Thus, the Unions argue at length that F.E.C. has taken the position that the Railway Labor Act is

[20] An additional irrelevancy introduced by the Unions in this case is their reference to picketing enjoined by the federal courts in 1963, in cases entirely unrelated to this one (U. br. pp. 21-24). These cases, which are not before the Court, are cited for the first time in this litigation and are clearly irrelevant.

entirely suspended during a strike, that the Act is "inapplicable" and "no longer limits the conduct of the parties" (U. br. pp. 40-41). These characterizations of F.E.C.'s views are straw men, set up in order to give F.E.C.'s opposition something to knock down. They entirely misrepresent the Railway's position.

The right of a carrier to operate during a strike in temporary disregard of collective bargaining agreements connotes neither a suspension of the Act nor an exception thereto. Absent the statute, the right of self-help clearly exists; and the burden is thus on F.E.C.'s opposition to show that this conduct which is *prima facie* lawful is rendered unlawful by the statute. This burden is not carried by the United States and the Unions. They are unable to show that either the intention of the statute, industry practice, prior decisions of federal courts and responsible agencies, or the philosophy of collective bargaining in the United States outlaws the temporary, strike-induced operating practices at issue. The suggestion that F.E.C. believes the provisions of the Act relating to proposed permanent changes in agreements to be "suspended", or claims an "exception" therefrom, is incorrect. As concerns such changes, the Railway believes that the Act continues to be applicable all during the period of a strike. Temporary practices adopted in response to a strike, however, were not intended to be restricted, and are not outlawed by the Railway Labor Act.[21]

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[21] The United States attempts to justify its standing to challenge the temporary practices adopted by the Railway on grounds other than those relied on by the Court below (U.S. br. pp. 51-55). F.E.C. remains unconvinced that the United States has standing to intervene in private labor disputes in the absence of actual interference with or obstruction to interstate commerce: see *United States* v. *United Mineworkers of America*, 330 U.S. 258 (1947).

CONCLUSION

It is respectfully submitted that the decision of the Court below should be reversed and that the injunctions issued against the F.E.C. in the courts below should be vacated.

Respectfully submitted,

WILLIAM B. DEVANEY

GEORGE B. MICKUM, III

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Washington, D. C. 20036
Counsel for Petitioner

Of Counsel:

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1250 Connecticut Avenue, N. W.
Washington, D. C. 20036

April 9, 1966

APPENDIX

APPENDIX

APPENDIX A

FLORIDA EAST COAST RAILWAY COMPANY

St. Augustine, Florida,
September 28, 1962.
2

Mr. E. C. Thompson, Executive Secretary,
National Mediation Board,
Washington, D. C.

Dear Sir:

This will acknowledge receipt of your letter of September 25, 1962, concerning Case No. A-6627 Sub. No. 1, proffering arbitration in the dispute described by you as follows:

> "Employes notice dated 9-1-61 requesting 25¢ per hour increase in rates of pay and 6 months advance notice to discontinue positions, also carrier's counter proposals as served by the various carriers on organizations involved on or about 9-18-61 proposing changes in rates of pay for certain employees and various rules changes."

It is my position that the proffer of arbitration in this dispute is premature and that further mediation in the case might bring about an amicable settlement. Therefore, I suggest that the matter be re-docketed for discussion on the property.

Yours very truly,

/s/ R. W. WYCKOFF
Assistant Vice President and
Director of Personnel.

RWW-h
bc: Mr. W. L. Thornton (Personal).
As information.

THE ORDER OF RAILROAD TELEGRAPHERS
3860 LINDELL BOULEVARD
ST. LOUIS 8, MISSOURI

G. E. Leighty,
President

Telephone
JEfferson 3-8321

October 19, 1962

Mr. E. C. Thompson, Exec. Secretary
National Mediation Board
Washington 25, D. C.

Subject: Case No. A-6627
Sub No. 1
Florida East Coast Railway

Dear Sir:

Under date of October 10, 1961, the Eleven Cooperating Railway Labor Organizations, by its duly authorized representative, made application in due form and in accordance with the provisions of the Railway Labor Act for the services of the National Mediation Board in the following dispute:

> "Employes notice dated 9-1-61 requesting 25¢ per hour increase in rates of pay and 6 months advance notice to discontinue positions, also carriers' counter proposals as served by the various carriers on organizations involved on or about 9-18-61 proposing changes in rates of pay for certain employees and various rules changes."

Mediator James M. Holaren conducted mediation proceedings in connection with this dispute on two occasions without composing the differences. Under date of September 25, 1962, you addressed a joint letter to Mr. R. W. Wyckoff, Assistant Vice President and Director of Personnel of the Florida East Coast Railway Company and the undersigned, requesting and urging that we enter into

an agreement to submit the controversy to arbitration as provided in Section 8 of the Railway Labor Act.

Under date of September 28, 1962, Mr. Wyckoff addressed a letter to you in which he took the position that the proffer of arbitration in this dispute is premature and that further mediation in the case might bring about an amicable settlement and suggested that the matter be redocketed for discussion on the property. Knowing the situation as I do, I cannot agree that the suggestion made my Mr. Wyckoff would be helpful.

This identical dispute was before Emergency Board No. 145 which made its report and recommendations and the Carrier's Conference Committees and the Eleven Cooperating Railway Labor Organizations entered into an Agreement disposing of this dispute on June 5, 1962. No good purpose would be served in arbitrating this identical dispute on the Florida East Coast Railway and we, therefore, must decline to arbitrate.

Very truly yours,

G. E. LEIGHTY
Chairman
Eleven Cooperating
Railway Labor
Organizations

NATIONAL MEDIATION BOARD

WASHINGTON

October 22, 1962
Case No. A-6627
Sub No. 1

Mr. R. W. Wyckoff
Assistant Vice President & Director of Personnel
Florida East Coast Railway Company
St. Augustine, Florida

Mr. G. E. Leighty, Chairman
Eleven Cooperating Railway Labor Organizations
c/o The Order of Railroad Telegraphers
3860 Lindell Boulevard
St. Louis 8, Missouri

Gentlemen:

We have been advised by Mr. Leighty, Chairman, Eleven Cooperating Railway Labor Organization, in answer to our letter addressed jointly to your respective carrier and organization, under date of September 25, 1962, that the organization has declined, in writing, to arbitrate the question in our Case No. A-6627, Sub No. 1.

Your attention is therefore directed to the last clause in Section 5, First (b) of the Railway Labor Act, as amended, reading as follows:

> "If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

It is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement.

In these circumstances, notice is hereby served in behalf of the Board that its services (except as provided in Section 5, Third, and in Section 10 of the law) have this day been terminated under the provisions of the Railway Labor Act.

We are sending to Mr. Wyckoff a copy of Mr. Leighty's letter dated October 19, 1962.

By order of the NATIONAL MEDIATION BOARD.

Very truly yours,

E. C. THOMPSON
E. C. Thompson
Executive Secretary

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 750

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL–CIO ET AL., PETITIONERS

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 782

UNITED STATES OF AMERICA, PETITIONER

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS RESPONDENT IN NO. 783

The contention principally urged both by the carrier (FEC) and the Association of American Rail-

roads, as *amicus curiae,* is that rates of pay, rules and working conditions as provided in existing collective bargaining agreements are, as a matter of law, entirely "suspended" during a lawful strike, leaving the carrier free to operate under any rules, conditions and pay rates it chooses. Thus FEC asks this Court to "vindicate" its right "during the strike to operate free of the necessity of compliance with its agreements with the striking labor organizations" (FEC Br. p. 26), and the *amicus* Association urges that any struck carrier is "entitled in its exercise of its right of self-help to operate or attempt to operate as best it can for the duration of the work stoppage *under such temporary working conditions as it alone deems necessary* and which are not otherwise unlawful" (Amicus Br. p. 5; emphasis added). FEC suggests that such a rule is not a serious incursion into the regulatory scheme of the Railway Labor Act, since unions desiring to compel carriers to abide by their agreements could obtain relief "instantly by the unions calling off the strike" (FEC Br. p. 27).

In our main brief we pointed out how the rule of total "suspension" thus urged here by the carriers is (1) flatly inconsistent with the terms of the Railway Labor Act (pp. 19–25); (2) unsupported by the legislative history of that Act (pp. 25–26, n. 18); (3) contrary to past practice in the railroad and airline industries under the Act (pp. 38–44); and (4), most importantly, would almost surely disrupt—and perhaps entirely destroy—the good faith statutory bargaining and mediation which the Act requires (pp. 25–33). In-

deed, we showed that such a rule of law has been squarely rejected as destructive of the duty to bargain in good faith even under the National Labor Relations Act, which contains no explicit *status quo* provisions requiring adherence to existing agreements during a strike and where strikes typically occur only after existing agreements have expired (pp. 33 and 38–40, n. 24 and n. 28).

For these reasons, the court of appeals was clearly correct in rejecting the contention of total "suspension" now urged by the carriers (R. 909). The carriers now do not seriously urge that their position is affirmatively supported by the terms of the Act or its history.[1] Nor do they address themselves at any point to the devastating effect which their proposed rule would have upon good faith statutory bargaining under the Act, other than to urge, as noted above,

[1] FEC urges that "temporary practices necessary to rectify the lack of manpower resulting from a strike do not themselves involve a 'change * * * in agreements'" prohibited by Section 2, Seventh, of the Act (FEC Br. p. 23). The words omitted from the statute by FEC in making the contention are, however, of considerable importance. The Act prohibits not a "change * * * in agreements," as FEC states (which might refer only to a permanent change) but a "change [in] the rates of pay, rules, or working conditions of its [the carrier's] employees, as a class, as embodied in such agreements." As written by Congress the statute thus clearly prohibits temporary as well as permanent changes in conditions as set by agreements. The *amicus* Association of American Railroads urges otherwise, with no support for its view in the language of the statute, on pp. 45–49 of its brief. The legislative history is discussed at pp. 24–25 of FEC's brief and pp. 50–53 of the *amicus* brief.

that a union wishing to compel a carrier to abide by its agreements and the Act can always "call * * * off the strike," a strike being the only means at a union's disposal for pursuing its demands after statutory bargaining has been exhausted without a negotiated solution. The carriers do, however, suggest that an unlimited right of "self-help" once a lawful strike commences, permitting a carrier to take whatever steps it deems necessary to nullify the effect of the strike, is supported by railway practice, certain judicial decisions and awards of the National Railroad Adjustment Boards, and common-law contract principles. These contentions warrant a short response. We also respond here to FEC's suggestion (Br. pp. 33–42) that even if collective bargaining agreements remain vital during a strike (as we contend), federal district courts lack jurisdiction to compel adherence to those agreements because of the "minor" dispute jurisdiction of the National Railroad Adjustment Board.

1. We note first that the doctrine urged here by the carriers—*i.e.*, that their existing collective agreements are of no force whatsoever in prescribing wages, rules or working conditions during the course of a lawful strike—is not only contrary to the plain language of the Railway Labor Act, but also to the terms of the agreements themselves. FEC's agreements typically contain express conditions that the rules and rates of pay contained therein "shall be subject to change only in the manner prescribed by law" (Rule 157, Agreement between FEC and its Machinists, Boilermakers, etc., p. 74). Nor are these agreements

open to the interpretation that they become inapplicable during a strike when supervisors or replacements are used as substitutes for striking union members. They provide that:

> It is understood that this agreement shall apply *to those who perform the work specified in this agreement* in the Maintenance of Equipment Department of this Railway wherein work covered by this agreement is performed. [Id., p. 1; emphasis added.]

Moreover, even FEC's officials have not invoked the legal doctrine of total suspension of existing agreements now asserted by their counsel and the *amicus*. Mr. Wycoff, FEC's Vice President, stated his view before the district court that "the rules that are in effect are those that are negotiated. We can't change those rules unilaterally. We can deviate from the rules where we have to in order to operate the property" (R. 295).

2. Secondly, the carriers seem to differ with our understanding that industry practice does not support a rule permitting carriers to ignore existing collective bargaining agreements during the course of a lawful strike (FEC Br. pp. 27–32; *Amicus* Br. pp 19–22). We stated in our main brief that we could find no previous instance in which a carrier had urged the right to operate during a strike free from its existing agreements or in which a court had accepted such a contention (p. 39). We stated, more specifically, that strike operations in the railroad industry had been rare, thus negating any established practice regarding the rights of a struck carrier to disregard the

terms of its agreements (p. 41); and that in the airline industry, where strike operation has been more frequent, such operation has been undertaken with adherence to existing agreements, *e.g.*, *Western Air Lines* v. *Flight Engineers Int'l Ass'n*, 194 F. Supp. 908, 909 (S.D. Cal.) (pp. 41–42). Finally, we urged that the awards of the National Railroad Adjustment Boards reflected no understanding that existing agreements become inapplicable upon the occurrence of a strike but that, on the contrary, such awards reflected an understanding that agreements remained applicable during strike periods (pp. 42–43, n. 30).

In their briefs, neither FEC nor the *amicus* point to any evidence to rebut the fact that no carrier prior to this case has affirmatively asserted or practiced the right to operate during a lawful strike wholly without regard to its existing collective agreements. While the Annual Reports of the National Mediation Board for the period 1955–1964 show no railroad strike of consequence in which operation was attempted (U.S. Br. p. 41), the *amicus* points to three recent instances where limited strike operation was attempted primarily through the use of supervisory personnel for short periods of time (the longest period being 47 days by a local switching railroad in Houston, Texas).[2] *Amicus* does not suggest that these carriers,

[2] If that railroad had substantially disregarded existing terms of employment while operating during that 1965 strike, the unions would likely have invoked the decisions of the Fifth Circuit in this case to obtain an injunction against such conduct.

in their limited use of supervisory personnel, urged or practiced a right to operate without regard to existing agreements—rather, the fact that only limited operations with supervisors were attempted in almost every instance would seem to suggest, if anything, that existing agreements were at least generally, and perhaps entirely, adhered to.[3] In all events, such instances certainly do not establish a "common practice" (*Amicus* Br. p. 20) in the railroad industry wholly to ignore existing agreements during a lawful strike.[4]

In the airline industry, the carriers again point to no instance where "suspension" of existing agreements during a strike was practiced or asserted. As we note in our main brief (pp. 41–42, n. 29) the explicit assumption has been, to the contrary, that existing agreements

[3] Limited use of supervisory personnel would likely not contravene any existing agreements. See *Brotherhood of R. Trainmen* v. *Ky & Ind. Terminal R. Co.*, 122 NRAB (1st Div.) 38 (1955).

[4] Nor does the Transcript of Proceedings of the Presidential Railroad Commission (1961), pp. 14666–14822, referred to in the *amicus* brief (pp. 20–21), show that it is "common practice" for railroads to operate during a strike; only one such instance of operations during a strike (by one small railroad) with supervisory personnel, and none with replacements, is referred to in that testimony. In fact, a union representative at those proceedings remarked that generally "railroads choose to close down when they have strikes." *Id.*, p. 14719. There is considerable testimony in the material referred to by the *amicus* that railroads have, on a number of occasions, served a single struck plant on their line by using supervisory personnel, when employees refused to cross picket lines. Such action would probably not violate existing agreements. See footnote 3, *supra*.

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remain in full force during a lawful strike when operation is attempted.[5]

Nor do the awards of the National Railroad Adjustment Board support the proposition, as FEC contends (Br. 29) that "collective bargaining agreements are not in force during a strike." Indeed, these awards have precisely the opposite import. Most of the awards FEC cites hold that, when faced with a strike, a carrier may invoke "emergency" provisions *in its agreements,* and take steps to counteract the strike, such as locking out employees, *in conformance with the provisions of its agreements. E.g., Brotherhood of Ry. & S.S. Clerks* v. *Macon, Dublin & Savannah R. Co.,* 98 NRAB (3d Div.) 730 (1961); *Brotherhood of Maintenance of Way Employees* v. *Missouri Pac. R. Co.,* 48 NRAB (3d Div.) 583 (1950); *Brotherhood of Maintenance of Way Employees* v. *St. Louis Southwestern Ry. Co.,* 48 NRAB (3d Div.) 291 (1950) (See also our main brief, pp. 42–43, n. 30). There is no suggestion in these awards that a carrier becomes

[5] FEC does suggest, however (Br. pp. 18, 29), that in one instance, see *Flight Engineers Int'l Ass'n.* v. *Eastern Air Lines,* 208 F. Supp. 182 (S.D. N.Y.), affirmed, 307 F. 2d 510 (C.A. 2), certiorari denied, 372 U.S. 945, Eastern Air Lines asserted, and was granted, the right to operate during a strike in violation of an existing agreement regarding crew complements. The fact is, however, as the opinions show, that the change made by Eastern after the strike commenced was the very change over which the Engineers struck. The court held that since that proposed change had been through full statutory negotiation, its unilateral implementation by the carrier after the statutory procedures were exhausted was fully consistent with the terms of the Act. See also, our main brief, footnote 29, p. 42.

free of its agreements once a strike commences—their reliance upon emergency provisions of the agreements to justify the action taken means exactly the contrary.

Another NRAB award cited by FEC shows even more clearly that other railroads have not thought that their agreements were wholly "suspended" during a strike. *Order of Ry. Conductors* v. *Boston & Maine R.* 89 NRAB (1st Div.) 821 (1950). The railroad in that case successfully defended a claim for a day's wages during a strike *not* on the ground that its agreement with the conductors was "suspended" by their strike (as FEC urges), but rather on the ground that no rights *under the agreement* had been denied claimant, who failed to make himself available for the operations being carried on during the strike. The clear implication, not disputed by the railroad, was that the railroad could not deny an employee in the striking craft his seniority rights or other rights as provided in the agreement, even though a strike was in progress.

3. FEC also relies upon decisions of this Court (*Brotherhood of Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284) and of the Court of Appeals for the Second Circuit (*Pan American World Airways, Inc.* v. *Flight Engineers' Int'l. Ass'n.*, 306 F. 2d 840) for its proposition that a carrier has an unlimited right of "self-help" during a strike, which justifies total departure from its existing agreements in order to negate the effect of the strike. The *amicus* (Br. pp. 22–25) relies upon common-law principles of contract allegedly to the same effect.

This Court's decision in the *B & O* case holds that, once a dispute over a proposed change in existing agreements has fully exhausted the statutory procedures (as did the underlying wage and notice dispute in this case), "both parties, having exhausted all of the statutory procedures, are relegated to self help *in adjusting this dispute* * * *" (372 U.S. at 291, emphasis added). The court of appeals' decision is to the same effect. Thus, the union may strike to enforce its demands, as it did here (but it may not strike to enforce other demands which have not been fully negotiated); a carrier may lock out its employees to achieve its demands; and, most importantly, where the conditions in dispute are subject to the carrier's immediate control, it may unilaterally implement those conditions without the union's agreement (again so long as the carrier's changes do not go beyond the scope of the prior negotiations). See our main brief, p. 28 and n. 21.

Thus, the "self-help" which the Act contemplates is "self-help" *in adjusting the particular dispute which has been negotiated*—it is not, as the carriers suppose, "self help" to defeat a strike, as the employer deems necessary, regardless of the provisions of existing agreements. A carrier can no more use the occasion of a strike over one issue, which has been negotiated, to make general changes in existing agreements for the purpose of defeating the strike than would a union be justified in using the exhaustion of negotiations over one issue as the excuse for including in its strike de-

mands a broad range of issues which had never been subject to negotiation. See our main brief, pp. 28–29.

Nor is it accurate to say, as FEC repeatedly asserts in its brief (*e.g.*, pp. 15, 20, 26), that an unlimited right of "self-help" to permit operation in strike conditions must be recognized, for without such a right a carrier's only alternative would be to "capitulate" totally to the union's demands. It is simply fanciful to assume that a strike—even if the carrier is wholly prevented from operating during its course—exerts economic pressure only upon the carrier, and leaves the union free to insist upon the full measure of its demands without concern for its prospects should the strike continue. The union, no less than the employer, has strong incentives to end even the most effective strike through compromise. On the other hand, it *is* true that, where a carrier is able to use "self-help" to impose unlimited unilateral changes in order to operate fully and profitably during a strike, *its* incentive to settle the underlying dispute is undoubtedly diminished and perhaps entirely removed. Thus, under the carriers' argument, it is the union which must either capitulate, and end the strike, or permit the employer indefinitely to exercise sole control over all wages, rules and working conditions on the theory that collective bargaining agreements have no effect during a strike. Moreover, as we point out in our main brief (pp. 44–46), carriers faced with a strike, unlike em-

ployers under the NLRA, have an adequate remedy against capitulation to a union's demands in an offer to submit the dispute to arbitration.[8]

Similarly, common-law contract principles do not justify a carrier in wholly ignoring its existing agreements at the onset of a lawful strike (See *amicus* Association Br., pp. 22–25). In the first place, even if, under applicable common-law principles, a lawful strike totally "suspended" existing agreements, the Act (Section 2, Seventh) nevertheless forbids carriers to change "rates of pay, rules or working conditions * * * as embodied in agreements" regardless of what the common-law status of such agreements might be.

The argument is, in addition, erroneous quite aside from the statutory terms. It simply is not true that, in engaging in a lawful strike over wages, the union "flatly refused to honor the agreements" (FEC Br. 28), or "repudiated" the agreements (*amicus* Association Br. 26). There is nothing in FEC's agreements

[8] The argument (*amicus* Association Br., pp. 12–19) that carriers must be permitted wholly to disregard their agreements in order to perform their obligations to provide service to shippers is without substance. It is no "public service" for a carrier to take unilateral action which enlarges the area of a labor dispute and increases the difficulty of settlement. It cannot be argued, in the light of the actual factual situation here—instead of "on very few bare facts" (*amicus* Association Br. 3)—that FEC's unilateral actions, which have delayed settlement of this dispute for years, have been to the public interest. A carrier's obligation to provide service cannot override the stated purpose of the Railway Labor Act "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions," 45 U.S.C. 151a(4), any more than it can justify a carrier's ignoring standards of safety in attempting to operate.

prohibiting a lawful strike over an issue unresolved by statutory bargaining and FEC points to no terms of its agreements which the unions have refused to perform. Indeed, any suit brought by FEC demanding either injunctive relief or damages against the unions for failure to perform their contracts by engaging in a lawful strike would obviously have been without legal basis. On the other hand, the case on which FEC and the *amicus* principally rely for the proposition that existing agreements are "suspended" during a lawful strike as a matter of contract law, *United Electrical, Radio & Machine Workers* v. *National Labor Relations Board*, 223 F. 2d 338 (C.A.D.C.), certiorari denied, 350 U.S. 931, is one in which "[t]he walkout was a material breach * * *" because it was in violation of an express no-strike clause. Moreover, this Court has since ruled that even such a *wrongful* strike in violation of a no-strike clause does not justify an employer in treating an agreement as entirely "suspended." *Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247.

The fact is that it is only FEC which has "repudiated" its agreements here. FEC agreed, without qualification, that its agreements "shall continue in effect until changed as provided herein or in accordance with the Railway Labor Act" (*e.g.*, Rule 76, Agreement between FEC and Clerical and Station Employees, pp. 88–89). It now seeks to treat that provision as ineffective because it interferes with its "right" to operate as it wishes during a strike.

4. Finally, we address ourselves to FEC's apparent contention (Br. pp. 33–42) that the district court here had no jurisdiction to enjoin unilateral changes prohibited by Section 2, Seventh, of the Act because, even if existing agreements are not suspended as a matter of law during a strike, the dispute here over the strike changes unilaterally instituted by FEC is a "minor" dispute subject to the exclusive primary jurisdiction of the National Railroad Adjustment Board. The Board, of course, has no injunctive powers.

It is true that "minor" disputes, within the primary jurisdiction of the adjustment board (see our main brief, pp. 19–20), may arise from actions taken by a carrier during a strike. *E.g., Western Air Lines* v. *Flight Engineers Int'l. Ass'n, supra; Brotherhood of Ry. & S.S. Clerks* v. *Macon, Dublin & Savannah R. Co.,* 98 NRAB (3d Div.) 730 (1961). As the court of appeals held, however, such "minor" disputes are ones over "whether *the agreement* authorizes action taken by the *Carrier.*" (336 F. 2d at 178–179; emphasis added). See also, *Elgin, J. & E.R. Co.* v. *Burley,* 325 U.S. 711. Proposed *departures from* existing agreements, on the other hand, clearly create "major" disputes over which the NRAB has no jurisdiction and as to which the *status quo* provisions of the Act, backed by the district court's injunction power, clearly apply. See, main brief for the United States, pp. 20–25; *Order of R. Telegraphers* v. *Chicago & N.W. Ry.,* 362 U.S. 330, 341; *Elgin, J. & E.R. Co.* v. *Burley, supra.*[7] With trivial exceptions, which we discuss

[7] FEC's contention (Br. 35–36), that no major dispute exists here because the sweeping unilateral changes it made did not

below, FEC has never suggested that any of the sweeping changes it unilaterally made in this case when the strike began were permitted by existing agreements. This is therefore clearly not a "minor" dispute over the meaning of existing agreements, and there is no basis for invoking the jurisdiction of the National Railroad Adjustment Board to interpret collective agreements when the carrier thus admits that the agreements, if applicable, do not permit its actions. Moreover, neither FEC nor the *amicus* remotely suggest that the question of law whether the agreements do indeed remain applicable during a strike is for the NRAB; such a question is, on the contrary, clearly for judicial determination. See, *e.g., John Wiley & Sons* v. *Livingston,* 376 U.S. 543.

It is true that, when genuine questions of contract interpretation arise during a strike, as in other periods, NRAB jurisdiction may properly be invoked. Indeed, such jurisdiction, permitting a carrier to urge

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look to the acquisition of future rights depends on the mistaken premise that FEC is not attempting to make prospective changes in terms of employment. Not only does FEC still propose to implement the "Uniform Working Agreement" on a permanent basis, in the negotiations now pending, but it also desires to change these working conditions radically for the future period of the strike.

Moreover, FEC's reasoning would appear to make *every* violation of Section 2, Seventh, and of the carrier's general duty to bargain (Section 2, First, 45 U.S.C. 152, First), a "minor" dispute. For example, were a carrier unilaterally to cut the wages of all employees 50 cents an hour, the carrier could argue that the employees could recover all lost wages from the NRAB, and that the adjustment board remedy is exclusive. Such a wage cut would, however, obviously create a major dispute. See *Burke* v. *Morphy*, 109 F. 2d 572 (C.A. 2), certiorari denied, 310 U.S. 635.

that a fair reading of its agreements permits some strike adjustments, is one of the persuasive reasons for rejecting a rule of law permitting "reasonably necessary" judicial exceptions to agreements during a strike. See our main brief pp. 49–50, n. 35. During the entire course of the litigation in the courts below, however, FEC has contended that only one departure from usual employment practices was in fact justified by existing agreements. FEC did assert (R. 209): "The contracting out of work is not prohibited by any of the agreements and much work has always been contracted out." FEC, however, offered no real evidence, either in contractual language or by way of extrinsic evidence of past practice, to support this allegation. Nor has FEC ever sought to refer this dispute to the NRAB, as permitted by Section 3 of the Act (45 U.S.C. 153).[8]

If FEC does wish, in fact, to pursue a dispute of contract interpretation before the NRAB, it will be time for the district court then to decide whether it should permit FEC to implement its view of the contract pending disposition of the dispute by the NRAB (see *Order of Ry. Conductors* v. *Pitney,* 326 U.S. 561, 566–567), or whether the circumstances justify enjoining the changes until the board acts, *New York*

[8] FEC now also appears to contend in this Court (Br. 39), for the first time, that the agreements involved in this case do not prevent it from disregarding craft and seniority district restrictions or using supervisors when sufficient personnel are not available.

Central R. Co. v. *Brotherhood of Loc. Fire. & Eng.*, 355 F. 2d 503 (C.A. 7). (See our main brief, pp. 49–50, n. 35).

CONCLUSION

For the reasons stated above, and in our main brief, the judgment of the court of appeals should be (1) affirmed insofar as it enjoins FEC from making unilateral changes in the rates of pay, rules and working conditions as provided in its existing agreements, and (2) reversed insofar as it permits the making of "reasonably necessary" unilateral changes in existing agreements.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 750

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, ET AL., *Petitioners,*

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 782

UNITED STATES, *Petitioner,*

v.

FLORIDA EAST COAST RAILWAY COMPANY, ET AL.

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, *Petitioner,*

v.

UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS IN NO. 750

ARGUMENT

Both the FEC's and the Association of American Railroads' principal argument is that the Railway Labor Act cannot be literally enforced against a car-

rier during a legal strike because this results in an unfair advantage to the striking unions for the reason that operation of a railroad in compliance with "the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements" will *always* mean that any operation at all is impossible.

The premise of this argument is that no collective bargaining agreement can ever be complied with under strike conditions. The Court of Appeals accepted this premise in the *Trainmen* decision as the basis for creating the doctrine of "reasonably necessary" exceptions, saying (336 F. 2d at 181):

> "Anything less either temporizes with the so-far-determined policy against compulsory arbitration, or puts the full weight of law on the side of the employees by making it impossible for the Railroad to carry on save on the terms and conditions *imposed* by the organized employees who now refuse to perform as agreed." (Emphasis added.)

Petitioners respectfully submit that the premise underlying this principal argument is false, and that the notion of a collective bargaining contract *imposing* conditions by one party on the other must spring from a basic misconception of the role and function of collective bargaining.

What goes into a collective bargaining contract is obviously no more *imposed* on the railroad by the organized employees than it is *imposed* on the employees by the railroad. A collective bargaining contract is, as the statute refers to it, an "agreement". It is the product of negotiation, of the give and take of collective bargaining. What results is probably not totally satisfactory to either party, but is agreed to by

both parties as the best compromise attainable under all of the circumstances then existing and therefore as being in each one's own selfish best interests.

With this in mind, it is clear that a labor agreement can easily be drawn which would impose virtually no hardship on a carrier under strike conditions. By the same token, one could be as easily drafted that would, in truth and fact, make operations under strike conditions impossible under any conceivable situation.

Whether a particular contract is more like the first than the latter category will depend and vary according to the particular factors involved in the negotiation of each individual agreement.

A lengthy brief could be written in this case closely analyzing and construing each of the eleven collective bargaining contracts here involved and showing that none of such contracts actually precludes operations by the FEC under existing strike conditions. This is not necessary, however, since the FEC itself conceded at the trial that full compliance at that time would not shut down the railroad, but only reduce its operations by from 30% to 50% (R. 196, 206, 214, 219, 330, 381, 354, 367, 771, 863).

In the *Trainmen* case counsel for the union attempted at oral argument before the Court of Appeals to demonstrate that full compliance with the *Trainmen's* contract was also not impossible for the FEC. There is no flat prohibition in the *Trainmen's* contract against using supervisors, but that contract does prohibit such use of supervisors where scope employees are ready and willing to perform the work. Thus, the railroad has been required to pay scope employees who wanted

to work but were deprived of work by the railroad's use of supervisors. Similarly, the *Trainmen's* contract could have, but did not flatly prohibit operating train crews through terminals. But the contract did require that when this was done, the railroad had to pay the crew doing double duty double wages, and also, if another crew, with first priority to the work, was thereby wrongfully deprived of a chance to work, the railroad would have to pay that other crew its lost wages too. Counsel also pointed out that the Union Shop clause obviously did not (and could not under Section 2, Eleventh, of the Act) prohibit hiring non-union employees or require that they be discharged except for failure "to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

The Court of Appeals took these arguments as "concessions" that the contracts need not be complied with under strike conditions (336 F. 2d at 181) as does the FEC in its initial brief to the Court in this case (Brief for Petitioner in No. 783, p. 32). This is not so. Such arguments are not "concessions" in any sense of the word, but merely illustrations of the fact that compliance with collective bargaining contracts by a struck railroad is not necessarily an impossibility but may be only an economic burden. How heavy a burden, and how close the burden comes to practical impossibility, depends upon how successfully the railroad emerged from its last contract negotiations. But to relieve a struck railroad from this economic burden, in whole or in part, by judicial decree is to take from the unions and striking employees an economic advantage already gained by them at the bargaining table by negotiation

with the railroad, perhaps at the cost of great concessions made and already given on their part.

The fact that contracts are and can be drawn with the idea of strike conditions in mind is clearly illustrated by the contracts in this case. The provision of Rule 16 of the Machinists', etc., contract as quoted at p. 47 of the Government's initial brief, and as it appears in the record at Exh. Vol., p. 255, illustrates this clearly. The carrier there proposed that special rules should become operative "in the event of a strike or emergency affecting the operations or business of the Carrier * * * " (Exh. Vol., p. 255). Through negotiations at the bargaining table the carrier substantially obtained its wishes in this regard (Exh. Vol., p. 255). No doubt the unions conceded on that point in return for some comparable concession in another part of the contract made by the carriers. For a court to then by decree make further concessions favorable to the carrier without any consideration to the union is to frustrate and undercut collective bargaining in the most fundamental way.

Indeed, the very fact that the carriers in national conference made the proposal set forth at Exh. Vol., p. 255, for special rules to govern strike operations (a proposal made prior to August 21, 1954; Exh. Vol., p. 239) is the most persuasive proof possible that the understanding of the railroad industry throughout the years of the Railway Labor Act's application is that contract rules, rates of pay and working conditions must be complied with under strike conditions. Otherwise, why propose and negotiate for special contract rules to cover such a situation The current contentions of the FEC and the Association of American Railroads that everybody concerned has always be-

lieved and understood that all contracts are suspended during the period of a strike, and a carrier may then operate under any rules it deems necessary, are expediently and flatly inconsistent with "Carriers' Proposal No. 11" made long before this litigation arose and set forth in Defendant's Exhibit No. OO (Exh. Vol., pp. 255, 238-261; R. 894):

> "Article VI—Carriers' Proposal No. 11
>
> "Establish a rule or amend existing rules to provide that in the event of a strike or emergency affecting the operations or business of the Carrier, no advance notice shall be necessary to abolish positions or make force reductions."

This proposal was made in the decade of the 1950's by all of the Class I American railroads represented by the Eastern, Western and Southeastern Carriers' Conference Committees to fifteen railway labor organizations, including the eleven union petitioners in this case (Exh. Vol., pp. 239, 259-261). Obviously, the carriers' representatives who made such a proposal at that time were strangely unaware of what the Association of American Railroads describes in its *amicus curiae* brief (pp. 21-22) as a practice so universally known and accepted in the industry that it has never been questioned before.

Petitioners suggest that the "reason why no court has ever ruled on the question raised here" (AAR brief, p. 21) and the reason why the suits the Government instituted in this dispute against the FEC are the first actions, either civil or criminal, brought by the United States under the Railway Labor Act (Government brief, p. 54), is that no carrier before has ever embarked upon such a bold and flagrant course of action

in the face of the heavy criminal penalties so dramatically computed by the AAR in its brief (pp. 42-44) and understandably not referred to in the FEC brief. This Court should not now sanction such a new and radical departure from the clear provisions of the Railway Labor Act.

Respectfully submitted,

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Certificate of Service

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 750

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, ET AL., *Petitioners*

v.

FLORIDA EAST COAST RAILWAY COMPANY

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UNITED STATES OF AMERICA, *Petitioner*

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, *Cross-Petitioner*

v.

UNITED STATES OF AMERICA

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTARY REPLY BRIEF OF FLORIDA EAST COAST RAILWAY COMPANY

In the Initial Brief of Florida East Coast Railway Company (No. 783), pp. 18, 29, reference was had to *Flight Engineers* v. *Eastern Air Lines*, 243 F. Supp. 701 (S.D.N.Y. 1965) and to the fact that an appeal was pending in the case. This case was decided on April 12, 1966 and the Opinion of the United States Court of Appeals for the Second Circuit follows:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 173—September Term, 1965.

(Argued January 4, 1966 Decided April 12, 1966.)

Docket No. 29997

FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, EAL CHAPTER, AFL-CIO, *Appellant*,

v.

EASTERN AIR LINES, INC. and AIR LINE PILOTS ASSOCIATION, *Appellees*.

Before: MOORE, SMITH and ANDERSON, *Circuit Judges*.

Appeal from an order of the District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*, granting summary judgment in favor of the defendants and directing the dismissal of plaintiff's amended or supplemental complaint for lack of jurisdiction over the subject matter. Affirmed.

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HERBERT A. LEVY, New York, N. Y. (Henry Weiss and Cohen and Weiss, all of New York, N. Y., with him on the brief), *for appellee Air Line Pilots Association*.

MOORE, *Circuit Judge:*

This appeal presents another facet of the drawn-out controversy between the defendant Eastern Air Lines, Inc.

(Eastern), the plaintiff Flight Engineers International Association, EAL Chapter, AFL-CIO (FEIA), and the defendant Air Line Pilots Association (ALPA). Portions of the controversy have previously come before the Civil Aeronautics Board, the National Mediation Board, and a variety of courts.

The opinion of the District Court ably sets forth the background of the dispute. 243 F. Supp. 701 (S.D.N.Y. 1965). Only the barest summary is necessary here.

Federal regulations require a crew of three—a pilot, a copilot, and a certified flight engineer—in certain of the larger commercial aircraft. ALPA, which represented Eastern's pilots and copilots, and FEIA, which represented Eastern's flight engineers, clashed in 1958 over the license requirements of the flight engineer, the "third man in the cockpit." FEIA maintained that he should hold a mechanic's license (A & E license), held by FEIA members but not generally held by ALPA members. ALPA maintained that he should hold a pilot's license (P & I license), held by ALPA members but not generally held by FEIA members. After a strike by FEIA, Eastern agreed to a four-man crew, one member of which had to have a mechanic's license but did not have to have a pilot's license. This arrangement continued until 1962, with occasional strikes by FEIA and repeated attempts by presidential commissions and boards to solve the underlying problem of who should fill the third seat in the cockpit.

On June 23, 1962, FEIA again went out on strike, causing Eastern to shut down operations. In mid-July Eastern offered to give pilot's training to FEIA flight engineers so that they would be eligible for occupancy of the third seat. FEIA did not accept the offer within the time set. Eastern then made the same offer individually to each of the striking engineers, informing them that if they did not report to work by July 24th, they might be replaced. On August 10, 1962, Eastern made a final proposal to the striking flight

engineers, promising them prior job rights on propeller equipment but not on jets, and stating that those who did not accept the offer by August 16th would lose all prior job rights. Under the terms of agreements which Eastern reached with ALPA during this period, pilots who applied for the position of "pilot engineer"—the new title given to occupants of the third seat in the cockpit—would suffer no loss of their pilot seniority.

On August 10th, Eastern began to replace the striking flight engineers with ALPA pilots and on August 25th Eastern notified all flight engineers still out on strike that they had been permanently replaced. FEIA and some of the striking flight engineers wrote Eastern on August 27, 1962, demanding that their discharge be processed as a grievance under the FEIA-Eastern collective bargaining agreement. Eastern rejected these demands on the grounds that the bargaining agreement had been terminated.

On September 27, 1962, FEIA offered to end the strike along the lines of settlement proposed by Eastern in July, provided that striking flight engineers could return to work in order of seniority. Eastern declined on the grounds that the strikers had been permanently replaced, so that there was no basis for further negotiation.

On September 28, 1962, FEIA informed Eastern that it would raise the replacement of the flight engineers as a formal grievance before the System Board of Adjustment established by the parties under the Railway Labor Act. Eastern refused to participate. As a result, the Mediation Board did not appoint a neutral member to the System Board of Adjustment.

Previous Litigation

FEIA has been seeking redress from Eastern and ALPA, together or separately, before a range of administrative and judicial bodies since the summer of 1962, for wrongs

alleged to have been committed during the summer of 1962. The history of these efforts is necessary to the resolution of the problem before us.

In the union's first attempt at administrative review, FEIA filed a complaint with the CAB alleging that Eastern had violated Section 410(k)(4) of the Federal Aviation Act, 49 U.S.C. § 1371(k)(4), which makes compliance with the Railway Labor Act a condition for the holding of a certificate by an air carrier. The complaint alleged a number of violations of the Railway Labor Act by Eastern. The CAB dismissed the complaint, partly on the grounds that similar grievances were the basis of pending actions in the courts, and partly because the uncertain nature of the FEIA representation of the flight engineers was a question for the National Mediation Board to decide. The Court of Appeals for the District of Columbia Circuit held that this dismissal was not an abuse of discretion by the CAB, although the Court indicated that it believed the CAB had some independent jurisdiction to decide whether the Railway Labor Act had been violated. 332 F. 2d 317 (D.C. Cir. 1964).

In 1964 FEIA sought a preliminary injunction to enjoin the National Mediation Board from holding an election to determine the bargaining representative of the flight engineers then working for Eastern, on the grounds that in determining who was qualified to vote in the representation election, the National Mediation Board had refused to investigate FEIA's charges of unfair labor practices. The district court held that the Mediation Board was under no duty to hold hearings on such charges. 230 F. Supp. 611 (D.D.C. 1964). The Court of Appeals affirmed, indicating that the Mediation Board had made some investigation as to the voting rights of the ALPA pilots who had replaced FEIA engineers. 338 F. 2d 280 (D.C. Cir. 1964).

In the summer of 1962 FEIA brought suit in the Southern District of New York, seeking a preliminary injunction

against Eastern on the grounds that Eastern had failed to bargain as required by the Railway Labor Act, and had bargained improperly by withdrawing earlier offers to the union and by writing to the individual employees. The district court denied the relief requested on the grounds that FEIA had shown no clear and convincing evidence of unfair labor practices and had not demonstrated a reasonable probability of success after trial. This court affirmed on the opinion below. 208 F. Supp. 182 (S.D.N.Y.), *aff'd per curiam*, 307 F. 2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963).

FEIA started the present suit against Eastern and ALPA in the Southern District of New York on August 21, 1962, requesting that the defendants be preliminarily enjoined from alleged violations of the Railway Labor Act. The district court found on the merits that the procedures for bargaining under the Act had been exhausted so that the parties were free to resort to economic self-help; that Eastern had bargained in good faith with FEIA; and that Eastern had not conspired with ALPA against FEIA. The court denied the request for a preliminary injunction on the grounds that FEIA had not shown a reasonable chance of success at a full trial. 45 CCH Lab. Cas. ¶ 17,814 (1962). This court affirmed on the ground that since the case involved problems of representation and problems of jurisdiction between labor unions, the district court was without jurisdiction to grant the relief which the plaintiff sought. 311 F. 2d 745 (2d Cir.), *cert. denied*, 373 U.S. 924 (1963). In February 1964 FEIA filed an amended or supplemental complaint against Eastern and ALPA, requesting not only an injunction against Eastern ordering it to recognize FEIA as the exclusive bargaining representative of the flight engineers, but also a declaratory judgment declaring that the many agreements between Eastern and ALPA (November 12, 1958, January 1, 1959, July 20, 1962, August 3, 1962, and August 6, 1962) were void and unenforceable; a mandatory injunction directing that Eastern reinstate the

striking FEIA flight engineers without prejudice, "ordering and directing Eastern to dismiss, if necessary, any employees hired to replace the striking Flight Engineers"; and a judgment for damages of $11,500,000, together with a similar sum "as exemplary damages."

Both defendants moved for summary judgment dismissing the amended complaint on the ground that the court was without jurisdiction to grant the relief requested. The district court granted the defendants' motions, partly on the ground that there was no evidence of violations of the act and partly on the ground that the district court lacked jurisdiction of the subject matter. 243 F. Supp. 701 (S.D. N.Y. 1965).

Much of the original complaint survives unaltered in its amended successor; and the passage of time has made these portions of the complaint no more a subject for judicial relief than they were at the time of the previous appeal. They still involve jurisdictional and representational disputes between the two unions—disputes which, under the Railway Labor Act, are "for non-curial treatment." *FEIA* v. *Eastern Air Lines,* 311 F. 2d 745 at 748 (2d Cir.), *cert. denied,* 373 U.S. 924 (1963).

The amended complaint contains several new allegations: that the striking FEIA members were wrongfully discharged; that Eastern unlawfully conditioned the strikers' return to work on their relinquishment of seniority rights, and unlawfully gave superseniority to the ALPA replacements; and that Eastern unlawfully refused to process the grievances of the discharged employees and prevented the effective review of those grievances by the System Board of Adjustment.

These so-called new allegations (the replacement of the strikers, the demand for reinstatement of the discharged engineers and money damages) must be examined in the light of the many previous proceedings and decisions in-

volving the controversies between Eastern, FEIA and ALPA as to the pilot-engineer status in the cockpit.

FEIA concedes that the determination of which union is to represent the occupants of the third seat in the cockpit is left to the National Mediation Board by Section 2, Ninth, of the Railway Labor Act. The National Mediation Board has made this determination. After deciding that both the strikers and their replacements could vote to choose a bargaining representative, it conducted a representation election, as a result of which it certified ALPA as the bargaining representative of the occupants of the third seat.

The allegations in the amended complaint which relate to the replacement of the strikers do not directly challenge the representational decision of the Mediation Board; but the judicial relief requested by FEIA flies "in the teeth of the board's certification" of ALPA, almost as much as a court order directing an employer not to bargain with a union flies in the teeth of the board's certification of that union. *Order of Railway Conductors* v. *Pennsylvania R.R.*, 323 U.S. 166, 172 (1944). As the complaint itself recognizes, Eastern could afford to reinstate five hundred striking FEIA members only if it dismissed a comparable number of their replacements, most of whom voted for ALPA. The result would be a radical shift in the composition of the work force which might well make possible the ouster of ALPA by FEIA as the bargaining representative of the third-seat occupants.

The claim for money damages would have a similar effect. If granted in anything like the amounts requested, employers in similar situations in the future would never care to deal with unions newly certified by the National Mediation Board, until they could obtain declaratory judgments from the courts as to the validity of the ousted union's claims that the Railway Labor Act had been violated—a result which would clash with the evident con-

gressional intent to have disputed questions of representation in an industry so charged with the public interest disposed of rapidly. See *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248, 256 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964).

We do not mean to say that courts may never consider claims that the Railway Labor Act has been violated, if two unions are present. The second *Ruby* case makes clear that even if two unions are on the scene, such claims may be heard by the courts in certain circumstances. *Ruby* v. *American Airlines*, 329 F. 2d 11 (2d Cir. 1964), *vacated as moot sub nom. O'Connell* v. *Manning*, 381 U.S. 277 (1965). But in that case, the issue was whether a court could order an employer to bargain with a union (the one most recently certified by the National Mediation Board); and that issue had been heard by no other court or administrative body. The allegations here more directly affect questions of representation; the relief requested, if granted, would to a large extent conflict with the certification of ALPA by the board; and many of the questions presented have previously been considered on the merits by the courts.

FEIA maintains broadly that Congress did not intend in the Railway Labor Act to create rights without remedies, and that as a result courts should step in to hear Railway Labor Act complaints where administrative agencies have declined to do so. The law is not that simple; nor is its application to the facts of this case. The Mediation Board considered the legality of the replacement of the strikers, at least to the extent of holding that the replacements were entitled to vote in the representational election. See *FEIA* v. *National Mediation Board*, 338 F. 2d 280, 282 (D.C. Cir. 1964).

Judge Levet found that the third seat positions on Eastern's jets were filled by replacements before Eastern's letter of August 8, 1962. This finding cuts the heart out of

FEIA's argument that Eastern unfairly discriminated against the strikers by denying them access to work on jets. Judge Levet also found Eastern's temporary contracts with ALPA were fair, and that Eastern had completely and permanently replaced all the strikers by August 25, 1962—a finding inconsistent with FEIA's present claim that its members were discharged before they had been replaced. 45 CCH Lab. Cas. ¶ 17,814 (1962).

Moreover, it seems clear that Congress did not intend courts to hear claims under the Act whenever no administrative body would hear them. In certain narrow areas, where the command of the statute is clear and the issue does not impinge on one committed for resolution to other bodies, judicial enforcement of the Railway Labor Act has been held proper. E.g., *Virginian R'y* v. *System Federation No. 40*, 300 U.S. 515 (1937). Courts may also require the Mediation Board to carry on its statutory duties to investigate and to certify. *Air Line Dispatchers Association* v. *National Mediation Board*, 189 F. 2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951). But the history of the Railway Labor Act, as interpreted by the Supreme Court, makes clear that in all other areas,

> "the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration . . . Courts should not rush in where Congress has not chosen to tread."

General Committee of Adjustment v. *Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 337 (1943).

To grant the judicial relief requested in FEIA's wholesale attack on the replacement of the strikers would directly affect the previous determination of the representational dispute by the National Mediation Board;[1] would reopen a controversy which has plagued the airlines for years and which has been fought to a rough conclusion by resort to the self-help envisaged by the act; and would lay down a precedent that would mean the inordinate protraction of comparable struggles in years to come. For these reasons, we do not feel that courts should consider the claims for judicial relief in FEIA's amended complaint which are directly connected with the replacement of the strikers.

The last of the new allegations in the amended complaint, concerning Eastern's refusal to process grievances and its paralyzing of the System Board of Adjustment, raises somewhat different problems.

The facts underlying FEIA's allegation are as follows. After Eastern told the striking engineers that they had been permanently replaced, FEIA and some of the strikers requested that the discharge of the engineers be processed as a grievance under the FEIA-Eastern collective bargaining agreement. Eastern refused to do so on the theory that the agreement had been terminated. The union attempted to bring the matter before the System Board of Adjustment, but the System Board split 2-2 on the problem. The collective bargaining agreement provided that if the System Board could not agree within a certain time, "it shall request the National Mediation Board to name a referee." Only the employee members of the System Board requested the naming of a referee, and the Mediation Board held that it had no power to name a referee under the cir-

[1] As the trial court stated in its opinion, "Moreover, to entertain FEIA's claims for reinstatement of its members would be to bring into issue the certification of the Mediation Board of ALPA as the bargaining agent for Eastern's flight engineers." (243 F. Supp. at 707.)

cumstances. The District Court for the District of Columbia upheld the position of the Mediation Board. *FEIA* v. *National Mediation Board*, 230 F. Supp. 611 (D.D.C.), *aff'd on other grounds*, 338 F. 2d 280 (D.C. Cir. 1964). FEIA maintains that Eastern's refusal to join in the request for the appointment of a neutral referee was in violation of Eastern's duty under Section 204 of the Railway Labor Act "to establish a board of adjustment."

This issue is properly one for judicial consideration, since the relief requested is not the circumvention of the act's provisions for adjustment and mediation, but rather the enforcement of those provisions. *IAM* v. *Central Airlines, Inc.*, 372 U.S. 682, 690 (1963); *Aaxico* v. *Air Line Pilots Association*, 331 F. 2d 433, 437 (5th Cir.), *cert. denied*, 379 U.S. 933 (1964); cf. *Virginian R'y* v. *System Federation No. 40*, 300 U.S. 515 (1937). However, we agree with the trial court that since the collective bargaining agreement between the parties had terminated, Eastern was no longer under any obligation to process as grievances the allegations of the union, or to maintain the System Board of Adjustment for the resolution of the claims here asserted by the Union.

As the Supreme Court made clear in *IAM* v. *Central Airlines*, 372 U.S. 682, 690 (1963), "the extent and nature of the legal consequences" (*Deitrick* v. *Greaney*, 309 U.S. 190, 200-201) of the duty to establish a board of adjustment under Section 204 are to be determined by the courts. In making this determination, we must bear in mind the intended function of the System Boards of Adjustment: to resolve minor disputes, i.e., disputes as to the interpretation and application of existing contracts, as opposed to "major disputes connected with a negotiation of contracts or alterations in them" (687), which the Act leaves for resolution to the processes of mediation. See *Elgin, J. & E. R'y* v. *Burley*, 325 U.S. 711, 722-24 (1945). The Act's provisions for boards of adjustment serve the same function as provisions for arbitration under the typical collective bargaining agreement—a means for deciding "the

smaller differences which inevitably appear in the carrying out of major agreements . . ." 325 U.S. at 724.

As long as it appears that the underlying collective bargaining agreement is still in effect, all disputes as to grievances and their processing should be solved by resort to the System Board of Adjustment, and courts will not permit this machinery to be paralyzed by unilateral action on the part of either the carrier or the representatives of the employees. See *IAM* v. *Central Airlines, supra; Aaxico* v. *ALPA, supra.*

The collective bargaining agreement between Eastern and FEIA was signed on December 31, 1958. By its terms, it was to continue in force until April 1, 1960, renewable thereafter on a yearly basis until notice of a desire to change the agreement was served by either party on the other prior to April 1st of any year. Such a notice was sent by FEIA on February 8, 1960. Negotiations between the parties continued intermittently until February 1962, and were followed by the appointment of a presidential emergency board under Section 10 of the Act. The Board filed its report to the President on May 1, 1962, and the freezing of the situation which had been caused by the appointment of the emergency board ended thirty days later. After June 1, 1962, the contract was no longer in effect and the union was free to strike. *FEIA* v. *Eastern Air Lines*, 208 F. Supp. 182 (S.D.N.Y.), *aff'd per curiam*, 307 F. 2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963). Unlike the collective bargaining agreement considered in *Manning* v. *American Airlines*, 329 F. 2d 32 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964), the status quo provisions of the Railway Labor Act had ceased to operate. Nor does FEIA suggest the existence of any conduct on the part of both parties which could serve as the basis for an argument that the parties had agreed to keep the former contract in effect although it was extinct by its own terms. The time for economic warfare had arrived, and the battle was not slow in coming.

Under such circumstances, what purpose could be served by maintaining the System Board of Adjustment? Presumably, it was still the appropriate forum for the assertion of rights which had arisen while the collective bargaining agreement was still in effect, see *Elgin, J. & E. R'y* v. *Burley*, 325 U.S. 711, 723 (1945). Conceivably it was the appropriate forum to consider the fairness of disciplinary action against the strikers, if a new agreement eventually was reached between Eastern and FEIA. *International Air Line Pilots Ass'n* v. *Southern Airways, Inc.*, 44 CCH Lab. Cas. ¶ 17,460 (M.D. Tenn. 1962). But no such rights are asserted here. The only "grievances" are those arising from the replacement *en masse* of the strikers, which began after the agreement had ceased to be effective. Even if we assumed that this issue, despite its large scale, would have been a "minor" dispute to be resolved by the System Board had the agreement remained in effect, the agreement was no longer in effect. All-out economic war had begun, and the replacements were Eastern's answer to FEIA's strike. Under such circumstances, Eastern was not under an obligation to maintain the System Board so that it could hear disputes of this sort. Cf. *Manning* v. *American Airlines*, 221 F. Supp. 301 (S.D.N.Y. 1963), *aff'd*, 329 F. 2d 32 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964).

In summary, FEIA bases its appeal largely upon the theory that there were genuine issues of material facts relating to (1) the discharge of FEIA engineers and their replacement by ALPA pilots; (2) Eastern's refusal to bargain in good faith; and (3) Eastern's efforts to promote ALPA as the bargaining agent instead of FEIA. However, the trial court has found that "since the agreement between Eastern and FEIA was no longer in force, Eastern was under no obligation to re-employ all the strikers" (243 F. Supp. at 708). The court concluded that the "additional claims advanced by FEIA do not change the nature of the controversy as found by the Court of Appeals" (p. 708). As to reinstatement and damages, it would follow, as the trial court held, that "since the Court is without juris-

diction of the subject matter, it is equally without jurisdiction to direct the reinstatement of the strikers or to award damages" (p. 708).

Although there may be interesting factual issues which FEIA might desire to explore, in view of the previous decisions they do not qualify as "material" facts. The trial court, therefore, was justified in deciding this case upon the motion for summary judgment "for lack of jurisdiction over the subject matter."

Affirmed.

Florida East Coast Railway Company submits that this case is squarely in point and fully supports the position it has advanced herein.

Respectfully submitted,

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April 18, 1966

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[2] *IAM* v. *International Aircraft Services*, 302 F. 2d 808 (4th Cir. 1962), on which FEIA relies, is readily distinguishable. In that case, arising not under the Railway Labor Act but under the National Labor Relations Act, the court held that an employer could not avoid a duty to arbitrate grievances with a union on the grounds that the union, because of the employer's allegedly unlawful replacement of union members, no longer represented a majority of the work force. Apart from the obvious differences between the breadth of the arbitration clause, there in question and the jurisdiction of the boards of adjustment under the Railway Labor Act, the union and the employer there had entered into a new collective bargaining agreement which was explicitly made retroactive to the termination date of the old agreement.

SUPREME COURT OF THE UNITED STATES

Nos. 750, 782, AND 783.—OCTOBER TERM, 1965.

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL–CIO, et al., Petitioners, 750 *v.* Florida East Coast Railway Company. United States, Petitioner, 782 *v.* Florida East Coast Railway Company. Florida East Coast Railway Company, Cross-Petitioner, 783 *v.* United States.	On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May 23, 1966.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This controversy started with a union demand on behalf of the nonoperating employees for a general 25-cent-per-hour wage increase and a requirement of six months' advance notice of impending layoffs and abolition of job positions. The demand was made of virtually all Class I railroads, including Florida East Coast R. Co. (hereinafter called FEC). The dispute underwent negotiations and mediation as required by the Railway Labor Act.[1] When those procedures proved unsuc-

[1] § 6, 44 Stat. 582, as amended, 48 Stat. 1197, 45 U. S. C. § 156; § 5, First, 44 Stat. 580, as amended, 48 Stat. 1195, 45 U. S. C. § 155, First (1964 ed.).

cessful, a Presidential Emergency Board was created under § 10 of the Act,[2] which after hearings recommended a general pay increase of about 10 cents per hour and a requirement of at least five days' notice before job abolition. In June 1962, this settlement was accepted by all the carriers except FEC. Thereupon, further mediation was invoked under the Act but again no settlement was reached. The Act makes no provision for compulsory arbitration. Section 5, First,[3] does, however, provide for voluntary arbitration at the suggestion of the Mediation Board. The suggestion was made but both the unions and FEC refused. Further negotiations were unsuccessful and on January 23, 1963, the nonoperating unions struck. When that happened, most operating employees refused to cross the picket lines.

FEC shut down for a short period; and then on February 3, 1963, resumed operations by employing supervisory personnel and replacements to fill the jobs of the strikers and of those operating employees who would not cross the picket lines. FEC made individual agreements with the replacements concerning their rates of pay, rules and working agreements on terms substantially different from those in the outstanding collective bargaining agreements with the various unions. Thereafter, FEC proposed formally to abolish all the existing collective bargaining agreements and to substitute another agreement that would make rather sweeping departures in numerous respects from the existing collective agreements. Negotiations between FEC and the unions broke down. The unions then invoked the mediation services of the National Mediation Board relative to the proposed changes, but the carrier refused. The

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[2] 44 Stat. 586–587, 45 U. S. C. § 160 (1964 ed.).

[3] 44 Stat. 580, as amended, 48 Stat. 1195, 45 U. S. C. § 155, First (1964 ed.).

unions thereafter agreed to submit the underlying dispute—the one concerning wages and notice—to arbitration. But FEC refused arbitration and shortly thereafter established another new agreement by unilateral action and operated under it until the present action was instituted by the United States in 1964—a suit charging that the unilateral promulgation of the new agreement violated the Act.[4] The nonoperating unions intervened as plaintiffs and hearings were held. Meanwhile, the Court of Appeals decided *Florida East Coast R. Co.* v. *Brotherhood of R. Trainmen*, 336 F. 2d 172, a parallel injunctive suit brought against FEC by an operating union and similarly complaining of FEC's unilateral promulgation of the new agreement. That court held that FEC had violated the Act by its unilateral abrogation of the existing collective agreements. It ruled, however, that FEC could unilaterally institute such changes in its existing agreements as the District Court found to be "reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions." 336 F. 2d, at 182. The District Court thereafter entered injunctions in the *Trainmen's* case, and in the present case, requiring FEC to abide by all the rates of pay, rules, and working conditions specified in the existing collective bargaining agreements until the termination of the statutory mediation procedure "except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court."

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[4] We have no doubt that the United States had standing to bring this action. Section 2, Tenth, 48 Stat. 1189, 45 U. S. C. § 152, Tenth, makes it the duty of the United States attorney to "institute in the proper court and to prosecute . . . *all necessary proceedings* for the enforcement" of § 2 (emphasis added) which FEC is here charged with violating. See *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 491–492.

Thereupon FEC filed an application for approval of some departures from its existing agreement with its nonoperating unions. The District Court, after hearings, granted some requests and denied others. Thus it permitted FEC to exceed the ratio of apprentices to journeymen and age limitations established by the collective agreement to contract out certain work, and to use supervisory personnel to perform certain specified jobs where it appeared that trained personnel were unavailable. The District Court denied FEC's request that it be permitted to disregard completely craft and seniority district restrictions, that it be allowed to use supervisors to perform craft work whenever it desired, that it be relieved of the duty to provide seniority rosters, that it be permitted to contract out work whenever trained personnel were unavailable, and that the union shop be declared void and unenforceable as to employees hired after January 23, 1963. Both sides appealed. The Court of Appeals affirmed on the basis of its decision in the *Trainmen's* case. 348 F. 2d 682. The unions, the United States, and FEC each petitioned for a writ of certiorari which we granted. 382 U. S. 1008.

The controversy centers around § 2, Seventh, of the Act,[5] which provides:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

The demand for a 25-cents-per-hour wage increase and for six months' advance notice of impending lay-offs and job abolitions was a major dispute covered by § 2, Seventh (*Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 723) and it had proceeded through all the major dispute pro-

[5] 48 Stat. 1188, 45 U. S. C. § 152, Seventh (1964 ed.).

cedures required by the Act without settlement. The unions, having made their demands and having exhausted all the procedures provided by Congress, were therefore warranted in striking. For the strike has been the ultimate sanction of the union, compulsory arbitration not being provided.

At that junction self-help was also available to the carrier as we held in *Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U. S. 284, 291: ". . . both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute. . . ."

The carrier's right of self-help is underlined by the public service aspects of its business. "More is involved than the settlement of a private controversy without appreciable consequences to the public." *Virginian Ry.* v. *Federation*, 300 U. S. 515, 552. The Interstate Commerce Act places a responsibility on common carriers by rail to provide transportation.[6] The duty runs not

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[6] 49 U. S. C. § 1 (4) provides in part:

"It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; . . ."

49 U. S. C. § 1 (11) provides in part:

"It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; . . ."

49 U. S. C. § 8 provides in part:

"In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter. . . ."

to shippers alone but to the public. In our complex society, metropolitan areas in particular might suffer a calamity if rail service for freight or for passengers was stopped. Food and other critical supplies might be dangerously curtailed; vital services might be impaired; whole metropolitan communities might be paralyzed.

We emphasize these aspects of the problem not to say that the carrier's duty to operate is absolute, but only to emphasize that it owes the public reasonable efforts to maintain the public service at all times, even when beset by labor-management controversies and that this duty continues even when all the mediation provisions of the Act have been exhausted and self-help becomes available to both sides of the labor-management controversy.

If all that were involved were the pay increase and the notice to be given on lay-offs or job abolition, the problem would be simple. The complication arises because the carrier, having undertaken to keep its vital services going *with a substantially different labor force,* finds it necessary or desirable to make other changes in the collective bargaining agreements. Thus we find FEC in this case anxious to exceed the ratio of apprentices to journeymen and the age limitations in the collective agreements, to make changes in the contracting-out provisions, to disregard requirements for trained personnel, to discard craft and seniority restrictions, the union shop provision, and so on. Each of these technically is included in the words "rules, or working conditions of its employees, as a class, as embodied in agreements" within the meaning of § 2, Seventh, of the Act. It is, therefore, argued with force that each of these issues must run the same gantlet of negotiation and mediation, as did the pay and notice provisions that gave rise to this strike.

The practical effect of that conclusion would be to bring the railroad operations to a grinding halt. For the procedures of the Act are purposefully long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute. If, therefore, § 2, Seventh, is applicable after a lawful strike has been called and after lawful self-help has been invoked by the carrier, the right of self-help might well become unilateral to the workers alone, and denied the carrier. For when a carrier improvises and employs an emergency labor force it may or may not be able to comply with the terms of a collective bargaining agreement, drafted to meet the sophisticated requirements of a trained and professional labor force. The union remains the bargaining representative of all the employees in the designated craft, whether union members or not. *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192. All these employees of the railroad are entitled to the benefits of the collective bargaining agreement, and the carrier may not supersede the agreement by individual contracts even though particular employees are willing to enter into them. See *Telegraphers* v. *Ry. Express Agency*, 321 U. S. 342, 347. But when a strike occurs, both the carrier's right of self-help and its duty to operate, if reasonably possible, might well be academic if it could not depart from the terms and conditions of the collective bargaining agreement without first following the lengthy course the Act otherwise prescribes.

At the same time, any power to change or revise the basic collective agreement must be closely confined and supervised. These collective agreements are the product of years of struggle and negotiation; they represent the rules governing the community of striking employees and the carrier. That community is not destroyed by the strike, as the strike represents only an interruption in the

continuity of the relation.[7] Were a strike to be the occasion for a carrier to tear up and annul, so to speak, the entire collective agreement, labor-management relations would revert to the jungle. A carrier could then use the occasion of a strike over a simple wage and hour dispute to make sweeping changes in its work-rules so as to permit operation on terms which could not conceivably have been obtained through negotiation. Having made such changes, a carrier might well have little incentive to reach a settlement of the dispute that led to the strike. It might indeed have a strong reason to prolong the strike and even break the union. The temptation might be strong to precipitate a strike in order to permit the carrier to abrogate the entire collective agreement on terms most favorable to it. The processes of bargaining and mediation called for by the Act would indeed become a sham if a carrier could unilaterally achieve what the Act requires be done by the other orderly procedures.

While the carrier has the duty to make all reasonable efforts to continue its operations during a strike, its power to make new terms and conditions governing the new labor force is strictly confined, if the spirit of the Railway Labor Act is to be honored.[8] The Court of Appeals used

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[7] In this connection, it bears emphasis that the District Court's authorization to deviate in part from the collective bargaining agreement would, as FEC readily concedes, terminate at the conclusion of the strike. At that time, the terms of the earlier collective bargaining agreement, except as modified by any new agreement of the parties, would be fully in force.

[8] If FEC had precipitated the strike by refusing to arbitrate, then it would be barred by *Trainmen* v. *Toledo P. & W. R. Co.*, 321 U. S. 50, from obtaining injunctive relief in the courts since it would have failed to make "every reasonable effort" to settle the dispute within the meaning of § 8 of the Norris-LaGuardia Act, 47 Stat. 72, 29 U. S. C. § 108. And we assume that seeking relief from provisions of the collective bargaining agreements would have fallen under the same ban. But in the instant case both FEC and

the words "reasonably necessary." We do not disagree, provided that "reasonably necessary" is construed strictly. The carrier must respect the continuing status of the collective agreement and make only those changes as are truly necessary in light of the inexperience and lack of training of the new labor force or the lesser number of employees available for the continued operation. The collective agreement remains the norm; the burden is on the carrier to show the need for any alteration of it, as respects the new and different class of employees that it is required to employ in order to maintain that continuity of operation that the law requires of it.

Affirmed.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

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the unions refused voluntary arbitration and the strike followed. Later the unions changed their mind and agreed to arbitration, FEC refusing. But by then the strike was on and the right to "self-help" had accrued. If an issue concerning the good faith of a party in refusing a pre-strike opportunity to arbitrate were presented, different considerations would apply.

Moreover, since the justification for permitting the carrier to depart from the terms of the collective bargaining agreement lies in its duty to continue to serve the public, a district court called upon to grant a carrier's relief from provisions of the collective agreement should satisfy itself that the carrier is engaged in a good-faith effort to restore service to the public and not, *e. g.*, using the strike to curtail that service.

SUPREME COURT OF THE UNITED STATES

Nos. 750, 782, AND 783.—OCTOBER TERM, 1965.

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL–CIO, et al., Petitioners, 750 *v.* Florida East Coast Railway Company. United States, Petitioner, 782 *v.* Florida East Coast Railway Company. Florida East Coast Railway Company, Cross-Petitioner, 783 *v.* United States.	On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May 23, 1966.]

MR. JUSTICE WHITE, dissenting.

The Act provides that until bargaining procedures are exhausted there shall be neither strikes nor changes in the contract. Section 2, Seventh (45 U. S. C. § 152, Seventh (1964 ed.)); § 5, First (45 U. S. C. § 155, First (1964 ed.)); § 6 (45 U. S. C. § 156 (1964 ed.)). Here, bargaining was exhausted only on wages and notice of layoffs and job abolition. At that point the union was free to strike and the carrier to make such changes as had been bargained for. The carrier was free to operate, if it could, but in my view only under the terms of the existing collective bargaining contract as modified with respect to those subjects on which the Act's procedures had been followed.

The Court agrees that § 2, Seventh, forbids the carrier itself to make any changes in the contract other than those on which bargaining has taken place, regardless of how necessary these changes are to the successful operation of the railroad. But with the consent of a United States court, or a state court for that matter, the carrier may now make any change essential to its continued operation.[1] Although the union remains the bargaining agent for all employees, strikers and replacements alike, *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, the carrier need not bargain with it, but with the court, if it wants to make changes which the Act forbids it to make alone. The union is free to strike and thereby to attempt to halt the operation of the railroad; but if it does, the court may—indeed, it must in some circumstances—permit the railroad to make any change in wages, hours and working conditions which is necessary to obviate the normal consequences of the strike. I fail to see how this exception can be read into the unequivocal language of § 2, Seventh.

This is very close to a judgment that there shall be no strikes in the transportation business, a judgment which Congress rejected in drafting the Railroad Labor Act. True, the Act was designed to maximize settlements and minimize strikes,[2] but Congress stopped short

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[1] Congress has generally entrusted the specialized and unique affairs of the railroad industry to a few expert boards and agencies. *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 752 (Frankfurter, J., dissenting). Permitting the wholesale intervention of the courts in this manner seems inconsistent with these congressional policies of uniformity and expert supervision. Cf. *Labor Board* v. *Brown*, 380 U. S. 278, 299 (White, J., dissenting); *American Ship Building Co.* v. *Labor Board*, 380 U. S. 300, 325–327 (White, J., concurring).

[2] It is certainly questionable whether the procedures approved by the majority will minimize strikes or maximize settlements. This particular strike is one of the longest in railroad history. There can be no doubt that the procedures followed in this case have helped

of imposing compulsory arbitration, the most obvious technique to insure the settlement of disputes and to prevent strikes. § 5, 45 U. S. C. § 155 (1964 ed.). Certainly it was not anticipated that a struck railroad could invoke the aid of the court to make changes in a contract which Congress had forbidden it to make. Nor did Congress anticipate what is in effect a new type of railroad receivership designed to last as long as necessary to blunt the effectiveness of a strike which the Act left the union free to call.[3] Had Congress impressed upon the railroads an absolute duty to continue operating while struck, perhaps an implied exception to § 2, Seventh, might be warranted. But, as the majority recognizes, no such duty has been placed on the railroads.

Of course the railroad was free to operate, but the Congress specified in § 2, Seventh, the terms on which it might do so. To change those terms is a task for Congress, not for a federal or a state court.

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prolong the strike. For example, in part because of these procedures, Florida East Coast enjoyed a substantial increase in its operating profits during the strike period. See Brief for Government, p. 8, n. 7.

[3] Cf. § 77 (n) of the Bankrupcty Act, 11 U. S. C. § 205 (n) (1964 ed.), which provides "No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in the Railway Labor Act. . . ." *Burke* v. *Morphy*, 109 F. 2d 572."